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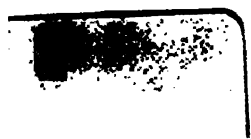
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A

DIGEST

OF THE

LAW OF EVIDENCE

ON THE TRIAL OF

ACTIONS AT NISI PRIUS.

BY HENRY ROSCOE, ESQ.

OF THE INNER TEMPLE, BARRISTER AT LAW.

FIRST AMERICAN, FROM THE SECOND LONDON EDITION,

WITH NOTES; AND REFERENCES TO THE ENGLISH COMMON LAW AND

ECCLIASTICAL REPORTS,

BY JAMES BAYARD.

PHILADELPHIA :

P. H. NICKLIN & T. JOHNSON,

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ADVERTISEMENT
TO THE AMERICAN EDITION.

IN offering to the profession an American edition of **ROSCOE ON EVIDENCE**, the Editor thought it would greatly add to its convenience, to adapt its references to the English Common Law Reports, edited by Messrs. **SERGEANT** and **LOWBER**, and the English Ecclesiastical Reports, edited by **Mr. INGRAHAM**. This, he has endeavoured to do with accuracy, the only merit which such a work can claim. A few notes have been added, referring to American decisions in some cases where the law has been considered doubtful, or the judgments of our courts have been different from those of England.

PHILADELPHIA, April, 1832.

ADVERTISEMENT TO THE SECOND LONDON EDITION.

IN the present edition, the cases on the subject of evidence, decided since the first publication of this work, have been added, and the whole of the text has been revised and corrected. Some new titles have also been inserted, as “**Assumpsit on Promise of Marriage;**” “**Assumpsit for Interest of Money;**” “**Case for Excessive Distress;**” and “**Trespass for False Imprisonment;**” and considerable additions have been made to the former titles. The Index has also been re-constructed and much enlarged.

TEMPLE, June, 1831.



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A DIGEST,

&c.

In forming a digest of the *general rules* of evidence, the subject may be considered, first, with regard to the *nature* of evidence; secondly, with regard to the *object* of evidence; thirdly, with regard to the *instruments* of evidence; and, fourthly, with regard to the *effect* of evidence.

With regard to its *nature*, evidence may be considered under the following heads. Primary or secondary evidence; presumptive evidence; hearsay; admissions.

PRIMARY EVIDENCE.

It is a general rule, that the best evidence must be given that the nature of the case admits. *B. N. P.* 298. Thus where a will of lands is to be proved, the primary evidence of it is the will itself, and neither an exemplification of it, nor the probate is admissible. *Id.* 246, *post*. So in general where a contract has been reduced into writing, and been signed by the parties, the writing is the best evidence of it, and must be produced. *Vide post*, p. 8. But it is not in every case necessary, where the matter to be proved has been committed to writing, that the writing should be produced. If the narrative of a fact to be proved, has been committed to writing, it may yet be proved by parol evidence. Upon this principle, a receipt for money will not exclude parol evidence of the payment. *Rambert v. Cohen*, 4 *Esp.* 213, *post*. So where, in trover, to prove the demand, the witness stated that he had verbally required the defendant to deliver up the property, and at the same time served upon him a notice in writing to the same effect, Lord Ellenborough ruled that it was not necessary that the writing should be produced. *Smith v. Young*, 1 *Camp.* 439. So where the fact to be proved is, that certain persons stood in the relation of landlord and tenant, it was held that although there was a written contract, the fact of the tenancy might be proved by parol. *R. v. Inhab. of Holy Trinity*, 7 *B. and C.* 611,* *post*, p. 13. So, although there exists a deed of partnership may be proved by the acts of the parties; but, when, in order to prove a partnership between *Didot* and *Foudrinier*, whose assignees were parties to the suit, a witness was asked, whether he had not heard *Foudrinier* say, that by a deed between him and

* 14 Eng. Com. Law Reps. 101.

Didot, an interest belonged to Didot, Abbott, C. J. was clearly of opinion that no question could be asked as to what Foudrinier had said of the contents of a written instrument, without the production of the instrument, or an account of its non-production. *Bloxam v. Elsie, R. and M.* 187. Where it is necessary to prove the fact of a marriage, the entry in the parish register is not superior evidence, but the fact may be proved by the testimony of persons who were present, and witnessed the ceremony. *Vide post.* So the inscriptions and devices on banners displayed at a public meeting may be proved by parol, and it is not necessary to produce the banners themselves. *R. v. Hunt*, 3 B. and A. 566.^a

The primary evidence of all judicial proceedings, is the production of the proceedings themselves, or of examined copies of them. *Vide post.* Thus parol evidence is not admissible of the day on which a cause came on to be tried, as it is capable of proof by matter of record. *Ansley v. Smith*, 6 Esp. 80. *R. v. Page*, *Id.* 83. And where to prove that the plaintiff had been discharged under the insolvent act, it was proposed to give in evidence his admission to that effect, Lord Ellenborough held it insufficient, and said that to prove a judicial act of this sort, it was necessary to call the clerk of the peace, and to give in evidence the order of the court of quarter session by which the discharge was effected. *Scott v. Clare*, 3 Campb. 236. So parol evidence is not admissible to prove the taking of oaths required by the Toleration Act, as it will appear by the records of the court where the oaths were taken. *R. v. Hube, Peake*, N. P. C. 181.

The counterpart of a deed is not secondary evidence, but is admissible as original evidence against the party executing it and those claiming under him; *Burleigh v. Stibbs*, 4 T. R. 465. *Roe v. Davis*, 7 East. 363; and he will not be permitted to object that the original was not properly stamped. *Paul v. Meek*, 2 Y. and J. 116.

SECONDARY EVIDENCE.

It is a general rule, as already stated, that the best evidence must be given of which the nature of the case is capable. *B. N. P.* 293. Secondary evidence is therefore inadmissible, unless some ground be previously laid for its introduction by showing the impossibility of procuring better evidence.

What ground must be laid for the introduction of secondary evidence.] Before secondary evidence can be admitted, it must be proved that better evidence cannot be obtained. Thus in the case of a lost deed, after proof of its due execution, *R. v. Culpepper, Skin.* 673, the loss of the deed must be proved, and if two or more parts have been executed, the loss or destruction of all the parts should,

^a 5 Eng. Com. Law Reps. 377.

it seems, be proved before other evidence can be received. *B. N. P. 254. See Doxon v. Haigh, 1 Esp. 409.* Where the instrument is in the possession of the opposite party, parol evidence of its contents cannot be given without proof of the service of a notice to produce it. *See post, p. 4.* All the proper sources from which the primary evidence can be procured must be exhausted, before secondary evidence can be admitted. Thus the party who has the legal custody of an instrument must be applied to before parol evidence can be received. *R. v. Stoke Golding, 1 B. and A. 173.* So where a letter, which had been in the possession of the defendant, was filed in the court of chancery, pursuant to an order in that court, it was ruled, that secondary evidence of it was not admissible, it being in the power of either party to produce it on application to the court. *Williams v. Munning, R. and M. 18.*

Where secondary evidence is offered, in consequence of the loss of the primary evidence, it must be shown, in order to establish the loss, that diligent search has been made in those quarters from which the primary evidence was likely to be procured. Where the publisher of a paper, in which a libel had appeared, stated, that he believed the original was either destroyed or lost, having been thrown aside as useless, this was held sufficient to let in secondary evidence. *R. v. Johnson, 7 East, 66.* So where a license to trade had been returned to the secretary of the governor who had granted it, and the secretary swore that it was his custom to destroy or put aside such licenses amongst the waste paper of his office as of no further use; and that he supposed he had disposed of the license in question in the same manner as other licenses; and that he had searched for it but did not recollect whether he found it or not, though he did not think he had found it, the court held the loss sufficiently proved. *Kensington v. Inglis, 8 East, 278.* So where it became necessary to account for the non-production of a policy, and it was proved that it had been effected about seven years before, and having become useless on account of a second policy being effected, it had probably been returned to the plaintiff, and the clerk of the plaintiff's attorney a few days before the trial of the action, searched for it in the plaintiff's house, not only in every place pointed out by the plaintiff, but in every place which he thought likely to contain a paper of this description, the search was held to be sufficient. *Brewster v. Sewell, 3 B. and A. 296.* So in a settlement case, where it was proved, that one part only of an indenture had been executed, that the pauper and master were both dead at the time of trial, and that an inquiry for it had been made of the pauper shortly before his death, who said, that the indenture had been given up to him after the expiration of the apprenticeship, and that he had burnt it, and that an inquiry had also been made of the daughter and sole executrix of the master, who said she knew no-

thing about it, it was held that a sufficient inquiry had been made to render parol evidence of the contents admissible. *R. v. Morton*, 4 *M. and S.* 48. But where the party in whose possession the instrument was is alive, he must be called, and his declarations are not admissible. *R. v. Denio*, 7 *B. and C.* 620.⁴ *Parkins v. Cobbett*, 1 *C. and P.* 282.⁵ Thus where, in another settlement case, it appeared, that there were two parts of an indenture, one of which had been destroyed, and the other delivered to Miss T. to whom the pauper had been assigned, and that application had been made to Miss T. (who was not called) who said she could not find the indenture, and did not know where it was, the search was held to be insufficient. *R. v. Castleton*, 6 *T. R.* 236, and see *Williams v. Young-husband*, 1 *Stark.* 139. Where the loss or destruction of the paper may almost be presumed, very slight evidence of its loss or destruction is sufficient. *Per Abbott*, *C. J. Brewster v. Sewell*, 3 *B. and A.* 296.⁶ *Per Bayley*, *J. Freeman v. Arkell*, 2 *B. and C.* 496.⁷ The degree of diligence to be used in searching for a deed must depend on the importance of the deed, and the particular circumstances of the case. *Per Cur. Gully v. Bp. of Exeter*, 4 *Bingh.* 296.⁸ The presumption is that an useless instrument would be destroyed. *Per Bayley*, *J. R. v. East Fairley*, 6 *D. and R.* 153.⁹ Where it was the duty of the party in possession of a document to deposit it in a particular place, and it is not found in that place, the presumption is that it is lost or destroyed. *R. v. Stourbridge*, 8 *B. and C.* 96.¹⁰ 2 *M. and R.* 43. *S. C.*

[*Notice to produce, when necessary.*] In general, when any written instrument is in the possession of the opposite party, secondary evidence of its contents is inadmissible, without previous proof of a notice to produce the original. But where, from the nature of the proceedings, the party in possession of the instrument has notice that he is to be charged with the possession of it, as in the case of trover for a bond, a notice to produce is unnecessary. *How v. Hall*, 14 *East*, 274. *Scott v. Jones*, 4 *Taunt.* 865. *Colling v. Treweek*, 6 *B. and C.* 398.¹ So a notice is not required where the party has procured the possession of the instrument by fraud, as where he has received it, after the commencement of the action, from a witness called for the purpose of producing it under a subpoena duces tecum. *Leeds v. Cook*, 4 *Esp.* 256. A counterpart may be read without a notice to produce the original. *Burleigh v. Stibbs*, 5 *T. R.* 465. *Roe v. Davis*, 7 *East*, 363, *ante*, p. 2. In an action for seaman's wages, secondary evidence of the ship's articles is admissible under stat. 2 *G. II. c.* 36, s. 8, without a notice to produce them. *Bowman v. Manzlemun*, 2 *Camp.* 315. Notice to produce a notice is not requisite. *Kine v. Beaumont*, 3 *B. and B.* 288.² *Colling v. Treweek*, 6 *B. and C.* 398.¹ It seems to be the better opinion, that

⁴ 14 Eng. Com. Law Reps. 102. ⁵ 11 Id. 394. ⁶ 5 Id. 291. ⁷ 9 Id. 159.

⁸ 13 Id. 439. ⁹ 16 Id. 258. ¹⁰ 15 Id. 156. ¹ 13 Id. 208. ² 7 Id. 440.

neither party will be allowed, either in an examination in chief, or in a cross-examination, to inquire into the contents of a deed, merely because the opposite party has the original deed in his possession, in court, at the time of the trial, and that the opposite party may object to parol evidence of the contents on account of his not having received a notice to produce the original. 1 *Phill. Ev.* 425. 1 *Stark. Ev.* 362. See also *Doe v. Grey*, 1 *Stark.* 283.* *Doe v. Harvey*, 4 *Burr.* 2484.

Notice to produce; proof of possession of original.] In order to render a notice to produce available, it must be proved that the original instrument is in the hands of the opposite party or of his privy. The nature of this evidence must vary according to the nature of the instrument. Where it belongs exclusively to the party, slight evidence is sufficient to raise a presumption that it is in his possession. Thus, where a solicitor proved that he had been employed by the defendant to solicit his certificate, and that looking at his entry of charges, he had no doubt the certificate was allowed, this was held to be proof of the certificate having come to the defendant's hands. *Henry v. Leigh*, 3 *Campb.* 502. Where the instrument has been delivered to a third person, between whom and the party to the suit there exists a privity, notice to the latter is sufficient, as in an action against the owner of a vessel for goods supplied to the use of the vessel, a notice to the defendant to produce the order for the goods, which had been delivered to the captain, is sufficient. *Baldney v. Ritchie*, 1 *Stark.* 338. So in an action against the sheriff, a notice to his attorney to produce a writ which has been returned to the under-sheriff, while the defendant was in office, is sufficient. *Taplin v. Atty*, 3 *Bingh.* 164.* So also notice to a defendant to produce a check drawn by him, and paid by his banker, is sufficient to entitle the plaintiff to give secondary evidence of its contents, although the check remains in the banker's hands. *Partridge v. Coates, R. and M.* 156. *Burton v. Payne*, 2 *C. and P.* 520.* But where a paper had been delivered to a third person, under whom the defendant justified, and by whose directions he acted, a notice to produce, served upon the defendant, is not sufficient to authorize the admission of secondary evidence. *Evans v. Sweet, R. and M.* 83. *R. v. Pearce, Peake*, 76. But see *Pritchard v. Symonds, B. N. P.* 254. *contra*.

Notice to produce, form of.] A notice to produce may be by parol, and if both a written and parol notice have been given, proof of either is sufficient. *Smith v. Young*, 1 *Campb.* 440. A notice to produce a particular letter must specify the letter intended; to produce "all letters," is too general. *France v. Lucy, R. and M.* 341. *Jones v. Edwards, McCl. and Y.* 139. If the title of the cause is misdescribed in the notice, it will be bad, as "A. assignee

of B. and C. v. D." instead of "A. assignee of B. v. D." *Harvey v. Morgan*, 2 Stark. 19.¹

Notice to produce service of, on whom.] In general it is sufficient, even in a *qui tam* action, to service the notice to produce on the attorney or agent of the party. *Cates v. Winter*, 3 T. R. 306, 2 T. R. 203 (n). *Bryan v. Wagstaff, R. and M.* 327. But a notice to produce papers not necessarily connected with the cause, served on the attorney so late as to prevent the party from receiving it in time before the trial, is not good. *Vide v. Lady Anson*, 1 M. and M. 96.

Notice to produce, time of service of.] The notice must appear to be a reasonable notice. Service of the notice upon the wife of the defendant's attorney, in a town cause, late in the evening before the trial, was ruled insufficient. *Doe v. Gray*, 1 Stark. 283.² But notice to produce a letter served on the attorney of the party on the evening next but one before the trial, was ruled to be sufficient, though the party was out of England, the presumption being that on going abroad the party had left with his attorney the papers necessary for the conduct of the trial. *Bryan v. Wagstaff, R. and M.* 327. See also *Affalo v. Foudrinier*, 1 M. and M. 335 (n). And a notice served on the tenth of April, the trial being on the fourteenth, was ruled to be sufficient to let in secondary evidence of letters written eighteen years back, and addressed to the defendant, a foreigner, at his residence abroad. *Drabble v. Donner, R. and M.* 47.

Notice to produce, effect of.] If the party refuses to produce the papers required, such a circumstance does not afford any inference against him, it merely entitles the other party to give secondary evidence. *Cooper v. Gibbons*, 3 Campb. 363. *Lawson v. Sherwood*, 1 Stark. 315.³ Where a party has notice to produce a particular instrument, but does not say that he has not got it, though he has in fact delivered it to the stamp-office, the other party will be allowed to give parol evidence of the contents. *Sinclair v. Stephenson*, 1 C. and P. 585.⁴ If the party, giving the notice, declines to use the papers when produced, this, though matter of observation, will not make them evidence for the adverse party; *Sayer v. Kitchen*, 1 Esp. 210; though it is otherwise if the papers are inspected. *Wharam v. Rouledge*, 5 Esp. 235. Secondary evidence of papers, to produce which notice has been given, cannot be entered into until the party calling for them has opened his case, before which time there can be no cross-examination as to their contents. *Graham v. Dyster*, 2 Stark. 23.⁵

What is sufficient secondary evidence.] Where a notice to pro

¹ 3 Eng. Com. Law Reps. 222. ² Id. 391. ³ Id. 405. ⁴ 11 Id. 480.

⁵ 3 Id. 224.

duce a deed has been given, and the deed is not produced, a counterpart, if in existence, is the next best evidence; *R. v. Castleton*, 6 T. R. 236; if there be no counterpart, an examined copy; if no examined copy, parol evidence. *B. N. P.* 254. And parol evidence of a writing may be given as secondary evidence, though the person who wrote the instrument is alive and not called. *Liebman v. Pooley*, 1 Stark. 167. The copy of a copy is not the best secondary evidence when the original copy can be produced. *Ibid.* Where possession has gone along with a deed for many years, the original of which is lost or destroyed, an old copy or abstract may be given in evidence, although not proved to be true, because it may be impossible to give better evidence. *B. N. P.* 254. After notice to the defendant to produce a letter, which he admitted he had received from the plaintiff, it was ruled that an entry by a deceased clerk in a letter-book, purporting to be a copy of a letter from the plaintiff to the defendant, was evidence of the contents, proof being given that according to the course of business, letters of business written by the plaintiff were copied by this clerk, and sent off by the post. *Pritt v. Fairclough*, 3 Campb. 305. So the copy of a letter accompanied with a memorandum in the handwriting of a deceased clerk, purporting that the original had been forwarded by him, is evidence, with proof that this was the usual mode of transacting business. *Hagedorn v. Reid*, 3 Campb. 377. But where the practice of the defendant's counting-house was, that the clerk after copying a letter into the letter-book returned it to the defendant to seal, and that he, or another clerk, carried all the letters to the post-office, but there was no particular place of deposit in the office for such letters, and neither of the clerks had any recollection of the particular letter, though they swore that they had uniformly carried all letters given them to carry, Lord Tenterden ruled that the copy in the letter-book was not evidence that the original had been sent. His Lordship added, "If the duty of the clerk had been to see the letters he copied carried to the post-office, it might have done." *Toosey v. Williams*, 1 M. and M. 129. A copy taken by a copying machine is not evidence without a notice to produce the original. *Nodin v. Murray*, 3 Campb. 228. See *R. v. Watson*, 2 Stark. 129.

An entry in the register-book at the custom-house, stating, that a certificate of register was granted on an affidavit of A. that he was an owner, is not admissible as secondary evidence of the contents of the affidavit; some person who has seen the affidavit, and knows that it was made by A., must be called. *Teed v. Martin*, 4 Campb. 90. To entitle a party to go into secondary evidence of a writ, after its return, it must be shown, that search has been made in the treasury, and that subsequently to the return day the writ was in the possession of the opposite party, on whom notice to produce it has been served. *Edmonstone v. Plaisted*, 4 Esp. 160.

Where there are two parts of a written agreement, both executed at the same time, the one stamped and the other unstamped, the unstamped part is admissible as secondary evidence of the contents of the stamped part. *Waller v. Horsfall*, 1 *Campb.* 501, *Munn v. Godbold*, 3 *Bingh.* 292.^{*} 11 *B. Moore*, 49, S. C.

In order to prove the endowment of a vicarage, an old ledger or chartulary of an abbey, containing amongst other things an account of the several matters of endowment, and found in the possession of the person who had succeeded to part of the abbey estates, was admitted as secondary evidence of the endowment, search having been made for the original endowment. *Bullen v. Mitchell*, 2 *Price*, 399, S. C. in *D. P.* 4 *Dow*, 297.

In an action against an executor for money had and received, after notice to produce the probate, the original will, produced by the officer of the ecclesiastical court, and bearing the seal of that court, and endorsed as the instrument on which probate was granted, with the value of the effects sworn to, is admissible as secondary evidence. *Gorton v. Dyson*, 1 *B. and B.* 219.^{*} So where in an avowry for a rent-charge, the avowant could not produce the will under which he claimed (it belonging to the devisee of the land) but produced the ordinary's register of the will, and proved former payments, it was held sufficient evidence against the plaintiff, the devisee of the land charged. *B. N. P.* 246. But it seems in this case there should be a notice to produce.

Parol evidence inferior to written evidence.] In general, parol evidence is esteemed secondary in its nature to written evidence. Thus when an agreement has been reduced into writing, the writing must be produced; *Brewer v. Palmer*, 3 *Esp.* 213. *Doe v. Griffith*, 6 *Bingh.* 533;^{*} and if not properly stamped the plaintiff must be non-suited. But a mere memorandum not signed by the parties will not prevent the introduction of parol evidence. *Doe v. Cartwright*, 3 *B. and A.* 326;^{*} and see *Hawkins v. Warr*, 3 *B. and C.* 698.^{*} So where a verbal contract is made for the sale of goods, and is put into writing afterwards by the vendor's agent, for the purpose of assisting his recollection, but not signed by the vendor, it may be proved by parol. *Dalison v. Stark*, 5 *Esp.* 163. In order to render the production of the writing necessary, it must appear to relate to the matter in question; thus where the parol evidence is offered to prove a tenancy, it is not a valid objection that there is some written agreement relative to the holding, unless it should also appear that the agreement was between the parties as landlord and tenant, and that it continues in force to the very time to which the parol evidence applies. *Doe v. Morris*, 12 *East*, 237. See *Stevens v. Penney*, 2 *B. Moore*, 249.^{*} Where, in ejectment,

^{*} 11 Eng. Com. Law Reps. 108. ^{*} 5 Id. 63. ^{*} 19 Id. 159. ^{*} 5 Id. 306.

^{*} 10 Id. 215. ^{*} 4 Id. 117.

the plaintiff's witness proved an acknowledgment by the defendant that he held under T., and stated that he (the witness) had drawn an agreement touching the premises, between the plaintiff and T., it was held that the plaintiff was bound to produce the writing. *Fenn v. Griffith*, 6 Bingh. 533.⁴

Parol evidence inadmissible to vary or contradict a writing.] As parol evidence is inferior to written evidence, it is not admitted to vary or contradict the terms of an instrument in writing. Thus where it was agreed in writing, that A. for certain considerations should have the produce of Boreham meadow, it was held, that he could not prove by parol that he was to have both the soil and produce of Milcroft and of Boreham meadow. *Meres v. Ansell*, 3 Wils. 275; and see *Hope v. Atkins*, 1 Price, 143. So parol evidence is inadmissible to show that a note made payable on a day certain, was to be payable on a contingency only. *Dawson v. Walker*, 1 Stark. 361, *Woodbridge v. Spooner*, 3 B. and A. 233.⁵ So where the conditions of sale described the number and kind of timber trees to be sold by lot, but not the weight of the timber, it was held, that parol evidence could not be given that the auctioneer had at the sale warranted the timber of a certain weight. *Powell v. Edmunds*, 12 East, 6. So parol evidence is inadmissible to alter the legal construction of a written agreement. Thus where an agreement for the sale of goods was silent as to the time of delivery, in which case the law implies a contract to deliver in a reasonable time, it was held, that parol evidence of an agreement to take them away immediately was inadmissible. *Greaves v. Ashlin*, 3 Campb. 426. *Hal-liley v. Nicholson*, 1 Price, 404. But where, by agreement in writing, certain goods were to be delivered at fixed times, and part being delivered, a verbal agreement was made to extend the time for the delivery of the remainder, it was held, that evidence of such verbal agreement was admissible. *Cuff v. Penn*, 1 M. and S. 21. So parol evidence is admissible to show that a written contract between A. and B. was in fact made by B., not on his own account, but as agent. *Wilson v. Hart*, 7 Taunt. 295,⁶ 1 B. Moore, 45 S. C. Parol evidence is admissible of a contract collateral to that contained in a deed or writing, though relating to the same subject matter. *White v. Parker*, 12 East, 578. *Seago v. Deane*, 4 Bingh. 459.⁷

Parol evidence admissible to prove an additional consideration in a written instrument, or to vary the date, &c.] Where no consideration is mentioned in a deed, a consideration may be averred and proved by parol, for such averment stands with the deed, and does not contradict or vary it. *Mildmay's Case*, 1 Rep. 176, a. *Peacock v. Monk*, 1 Ves. 128. So where there is a consideration stated, ap

⁴ 19 Eng. Com. Law Reps. 159. ⁵ 2 Id. 427. ⁶ 5 Id. 268. ⁷ 2 Id. 112.

⁸ 15 Id. 39.

avermment of another consideration, which is not contrary to the deed, may be made. *Ibid.* *Villers v. Beaumont*, Dyer, 146, a. *Tull v. Parlett*, 1 M. and M. 472. So in a settlement case, where the deed of conveyance stated the consideration of the purchase to be twenty-eight pounds, parol evidence was admitted to show that the consideration was in fact thirty pounds. *R. v. Scammonden*, 3 T. R. 474. Parol evidence is admissible to prove a deed delivered on a day different from that on which it professes to have been indented and concluded. *Stone v. Bale*, 3 Lev. 348, and see *Steele v. Mart*, 4 B. and C. 272.¹

Parol evidence admissible to prove fraud in written instruments,] Where fraud is imputed, any consideration, however contrary to the averment of a deed, may be proved to show the fraudulent nature of the transaction. *B. N. P.* 173. See *Paxton v. Popham*, 9 East, 421. So in order to set aside a will for fraud, parol evidence may be given of what passed at the signing, and what the testator said. *Doe v. Allen*, 8 T. R. 147. The party charged with fraud will not be admitted to prove any other consideration than that stated. *Clarkson v. Hanway*, 2 P. Wms. 203.

Parol evidence admissible to prove custom not expressed in written instrument. Where the parties have contracted in writing, in many instances parol evidence is admitted to prove a custom affecting the contract, on the ground, that where such a custom exists, the parties must be taken to have made their contract subject to its operation. Thus, in the construction of mercantile contracts, parol evidence is always admitted to show the sense in which, according to the usage and custom of merchants, such contracts are to be understood. "As where a ship was warranted to depart with convoy, evidence of the usage amongst merchants was admitted to show that this meant convoy from the usual place of rendezvous. *Lethullier's Case*, 2 Stalk. 443. So to explain the meaning of "days" in a bill of lading. *Cochran v. Retberg*, 3 Esp. 121. See *Donaldson v. Forster*, Abbot on Shipp. 209, 5th ed., *Birch v. Depeyster*, 4 Campb. 385. 1 Stark. 210,* S. C. *Taylor v. Briggs*, 1 C. and P.¹ 525. *Simpson v. Henderson*, 1 M. and M. 300. So where there was an ambiguity on the face of an account, a clerk in the office in which the account was kept was permitted to explain the meaning of a particular item. *Hood v. Reeves*, 3 C. and P. 532." But proof of the usage of trade is not admissible to contradict the plain words of an instrument; as where a policy of insurance was "on the ship till moored at anchor twenty-four hours, and on the goods till discharged and safely landed," evidence of an usage that the risk on the goods as well as the ship expired in twenty-four hours was held inadmissible to qua-

¹ 10 Eng. Com. Law Reps. 331. * 2 Id. 359. ¹ 12 Id. 245. = 14 Id. 432.

lify the clear and unequivocal words of the policy. *Parkinson v. Collier, Park, Ins.* 416, 6th ed. So in an action on a warranty of "prime singed bacon," parol evidence was rejected of a practice in the bacon trade to receive bacon in some degree tainted, as "prime singed bacon." *Yates v. Pym*, 6 *Taunt.* 446, 2 *Marsh.* 141. S. C. It has been doubted whether the practice of admitting parol evidence in these cases has not been carried to an inconvenient length. See *Anderson v. Pücher*, 2 *B. and P.* 168.

A custom affecting the contract may be proved by parol in other as well as in mercantile contracts. Thus it may be proved, that a heriot is due by custom on the death of a tenant, though not expressed in the lease. *White v. Sayer, Palm.* 211. Or, that a lessee by deed is entitled by custom to an away-going crop, though it be not mentioned in the deed. *Wigglesworth v. Dallison, Dougl.* 201. So in the case of a lease not under seal. *Senior v. Armytage, Holt*, 197.* But where a covenant in express terms, or by necessary implication, excludes the customary right, evidence of such right is inadmissible. *Webb v. Plummer*, 2 *B. and A.* 746.

Parol evidence admissible to explain ancient charters, grants, &c.] In the construction of ancient charters, parol evidence has always been admitted to prove the continual and immemorial usage under the instrument. 2 *Inst.* 282. *R. v. Varlo, Cowp.* 248. *Chad v. Tilsed*, 2 *B. and B.* 406.* *Governors of Lucton School v. Scarlett*, 2 *Y. and J.* 330. So in the construction of ancient grants and deeds there is no better way of construing them than by usage, and *contemporanea expositio* is the best way to go by. *Per Lord Hardwicke, Attorney-General v. Parker*, 3 *Atk.* 576. However general the words of ancient grants may be, they are to be construed by evidence of the manner in which the thing has been always possessed and used. *Per Lord Ellenborough, Wild v. Hornby*, 7 *East*, 199. There seems to be no distinction in this respect between charters and private deeds. *Withnell v. Gartham*, 6 *T. R.* 398, *Stammers v. Dixon*, 7 *East*, 200. Evidence of usage, however, will not be admitted to overturn the clear words of a charter. See *R. v. Varlo, Cowp.* 248. In the case of modern deeds evidence of the acts of the parties is not admissible, in the construction of the instrument, to show their understanding of it. *Clifton v. Walmsley*, 5 *T. R.* 564. *Iggulden v. May*, 9 *Ves.* 333. 2 *N. R.* 452, S. C. *Moore v. Foley*, 6 *Ves.* 238.

Parol evidence admissible to discharge written agreements.] Although a deed cannot be revoked or discharged by parol, or even by writing not under seal, yet an executory argument, in writing, not under seal, may, before breach, be discharged by a subsequent parol agreement; *Lord Milton v. Edworth*, 6 *B. P. C.* 587; but,

* 9 Eng. Com. Law Reps. 446. • 3 Id. 71. • 6 Id. 171.

after breach, it cannot be discharged, unless by deed or accord and satisfaction. *B. N. P.* 152. *Willoughby v. Backhouse*, 2 *B. and C.* 824.⁴ So it seems, that where the instrument is in writing pursuant to the statute of frauds, it may yet be discharged by a subsequent parol agreement before breach. 1 *Phill. Ev.* 545, and see *Cuff v. Penn*, 1 *M. and S.* 21, *ante* p. 9.

Parol evidence admissible to explain latent ambiguity.] Where an ambiguity not apparent on the face of a written instrument is raised by the introduction of parol evidence, then from the necessity of the case, the same description of evidence is admitted to explain the ambiguity; for example, where a testator devises his estate of Blackacre, and has two estates called Blackacre, evidence may be admitted to show which of the Blackacres is meant; or if one devises to his son John Thomas, and he has two sons of the name of John Thomas, evidence may be admitted to show which of them the testator intended. *Per Gibbs, C. J. Doe v. Chichester*, 4 *Dow*, 93. So where land is devised to a person designated by her Christian and surname only, and no person of that name claims under the devise, parol evidence is admissible, to show that the name was mistaken by the person who took the instructions for the will. *Beaumont v. Fell*, 2 *P. Wms.* 141, and see *Careless v. Careless*, 1 *Mertv.* 384. And where a devise was to S. H. second son of T. H., but in fact he was the third son, evidence of the state of the testator's family and of other circumstances was admitted to show whether he had mistaken the name or not. *Doe v. Huthwaite*, 3 *B. and A.* 632.⁵ So where a fine was levied of twelve messuages in Chelsea, and it appeared that the cognizor had more than twelve messuages in Chelsea, parol evidence was admitted to show which messuages in particular the cognizor intended to pass. *Doe v. Wilford, R. and M.* 88. 8 *D. and R.* 549.⁶ Where a subject matter exists which satisfies the terms of the will, and to which they are perfectly applicable, there is no latent ambiguity, and no evidence can be admitted for the purpose of applying the terms to a different object, 3 *Stark. Ev.* 1026. Thus, where a testator devised his "estate at Ashton," it was held, that parol evidence was inadmissible to show that he was accustomed to call all his maternal estate "his Ashton estate," there being an estate in the parish of Ashton which was sufficient to satisfy the devise. *Doe v. Ozendon*, 3 *Taunt.* 147, *S. C. in Error*, 4 *Dow*, 65. See also *Carruthers v. Sheddon*, 6 *Taunt.* 14.⁷

Where the ambiguity is not latent, and raised by extrinsic evidence, but patent or apparent on the face of the instrument, parol evidence is not admissible to explain such ambiguity. Thus, where a blank is left for the devisee's name in a will, parol evidence cannot be admitted to show whose name was intended to be inserted. *Baylis v. Att. Gen.* 2 *Atk.* 239. See *Doe v. Westlake*, 4 *B. and A.*

⁴ 9 Eng. Com. Law Reps. 254. ⁵ 5 Id. 406. ⁶ 16 Id. 347. ⁷ 1 Id. 293.

57.* But where a blank was left for the Christian name only, parol evidence was admitted to prove the individual intended. *Price v. Page*, 4 Ves. 680. So in case of a devise "to Mrs. C." the chancellor referred it to the master to receive evidence, to show the person intended. *Abbot v. Massie*, 3 Ves. 148.

Where a blank is left in a written agreement, which need not have been reduced into writing, and would have been equally binding if written or unwritten (as if the agreement were to deliver goods to the amount of less than ten pounds, and a blank were left for the quantity of goods to be delivered), in such a case it is presumed, in an action for the non-performance of the contract, parol evidence might be admitted to show the quantity for which the parties agreed. 1 *Phill. Ev.* 521. So where in the bishop's register, a blank was left for the patron's name, it was held, that this might be supplied by parol evidence. *B. of Meath v. Lord Belfield*, 1 Wils. 215.

Parol evidence admissible on question of parcel or no parcel.] Where the question is, "parcel or no parcel," parol evidence is admissible to explain a writing. Thus, where a testator devised "all his farm called Trogues farm," it was held that it might be shown by evidence of what parcels the farm consisted. *Goodtill v. Southern*, 1 M. and S. 299. So in case of a written agreement to convey "all those brick-works in the possession of A. B.," declarations of A. B. at the time of the agreement were admitted to show what the brick-works were. *Paddock v. Fradley*, 1 Crom. and Jer. 90; and see *Davis v. Lewis*, 2 Chitty's Rep. 535,* 8 D. and R. 554.

Parol evidence admissible to prove a certain relation between parties.] The relation or relative situation of two parties may be proved by parol, though the contract out of which that relation arises be in writing. Thus in a settlement case it has been held that parol evidence of the fact of tenancy is admissible though the pauper held under a written contract. *R. v. Inhab. Holy Trinity*, 7 B. and C. 611,* sed vide *Strother v. Barr*, 5 Bingh. 155.* But where a tenancy is thus *prima facie* proved by parol, the other party who wishes to vary the terms of the tenancy must produce the written instrument. *R. v. Rawden*, 8 B. and C. 708.* So a partnership may be proved by parol, although there is a deed of co-partnership. *Alderson v. Clay*, 1 Stark. 405;* and see *Harvey v. Ray*, 9 B. and C. 356.* Vide ante, p. 1.

PRESUMPTIVE EVIDENCE.

Presumptive evidence, though liable to be rebutted by evidence to the contrary, is not in its nature secondary to positive evidence.

* 6 Eng. Com. Law Reps. 348. * 18 Id. 410. * 14 Id. 101. * 15 Id. 391.

* 15 Id. 329. * 2 Id. 445. * 17 Id. 391.

Thus, although the payment of rent may be proved by the positive evidence of a person who saw it paid, yet it may also be proved by the production of a receipt for later arrears (which affords a presumption that the earlier arrears are satisfied), without laying any ground for the introduction of such evidence by showing that positive evidence cannot be procured. *See post*.

As almost every fact is capable of being proved by presumptive as well as by positive evidence, a few of the most useful cases only will be selected as examples of the nature and application of presumptive evidence. In case of an ancient recovery accompanied by possession, it shall be presumed, that the tenant to the præcipe was seized of the freehold, and such seisin need not be proved. *Gilb. Ev.* 27. So a deed, thirty years old, or upwards, is presumed to have been duly executed, provided some account be given of the deed, where found, &c. *B. N. P.* 255. An endowment of a vicarage may be presumed from the long and continued possession of tithes and other profits. *Crimes v. Smyth*, 12 *Rep.* 4, and *see Wolley v. Brownhill*, *McClel.* 332. A license may be presumed, as where an enclosure having been made from a waste, twelve or fourteen years, and seen by the steward of the lord from time to time, without objection made, it was left to the jury to say whether or not the enclosure was made by the lord's license. *Doe v. Wilson*, 11 *East*, 56. The existence of a immemorial custom may be presumed from an uncontradicted usage of twenty years. *R. v. Jolliffe*, 2 *B. and C.* 54,* 3 *D. and R.* 240, *S. C.* The flowing of the tide presumptive evidence of a public navigable river. *Miles v. Rose*, 5 *Taunt.* 705,* 1 *Marsh.* 313, *S. C.* But the strength of this *prima facie* evidence upon the situation and nature of the channel. *R. v. Mountague*, 4 *B. and C.* 602.⁴

Presumption of payment.] If a landlord give a receipt for the rent last due, it is to be presumed that all former rent due by the tenant has been paid, *Gilb. Ev.* 157; and if the acquittance is under seal, it is an estoppel, and the presumption cannot be rebutted. *Ibid.* 158. Where a bill of exchange negotiated after acceptance is produced from the hands of the acceptor after it is due, the presumption is, that the acceptor has paid it. *Gibbon v. Featherstonehaugh*, 1 *Stark.* 225.* *Pfiel v. Vanbatenberg*, 2 *Campb.* 439. Proof that the plaintiff, and other workmen employed by the defendant, came regularly to receive their wages from the defendant, whose practice was to pay every week, and that the plaintiff had not been heard to complain of non-payment, is presumptive evidence of payment. *Lucas v. Novosilieski*, 1 *Esp.* 296, *Sellen v. Norman*, 4 *C. and P.* 80.⁴ So where the demand was for the proceeds of milk sold daily to customers by the defendant, as agent to the plaintiff, and it appeared that the course of dealing was for the defendant to pay

* 9 *Eng. Com. Law Reps.* 21. * 12 *Id.* 40. * 10 *Id.* 413. * 2 *Id.* 366.

⁴ 19 *Id.* 284.

to the plaintiff every day the money which she has received, without any written voucher passing, it was ruled that it was to be presumed, that the defendant had in fact accounted, and that the *onus* of proving the contrary lay on the plaintiff. *Evans v. Birch*, 3 *Campb.* 10. So where goods have been consigned to a factor to sell on commission, it may be presumed after a reasonable time (e. g. 14 years) has elapsed, that he has accounted. *Topham v. Braddick*, 1 *Taunt.* 572. Although, in analogy to the case of bonds, Lord Ellenborough ruled that a promissory note might be presumed to be paid after twenty years; *Duffield v. Creed*, 5 *Esp.* 52; yet it has been since held that the case is distinguishable from that of bonds, and that the rule as to twenty years does not apply. *Du Belloix v. Lord Waterford*, 1 *D. and R.* 16.^{*} The mere production of a cheque drawn by the defendant on his banker, and payable to the plaintiff, with proof that he endorsed his name upon it, and that it has been paid, affords *prima facie* evidence of payment to him. *Egg. v. Barnett*, 3 *Esp.* 196. But it was ruled by Dallas, C. J. that the mere proof of a cheque being made payable to A. and of A. having received payment of it, is not evidence of the payment of money by the maker to A. for it might have been given to a third person, and by him to A. *Lloyd v. Sandiland*, *Gow*, 16,[†] *sed quære*. Payment of a bond is presumed after twenty years, without demand made; *Oswald v. Leigh*, 1 *T. R.* 270; and even after the lapse of a less time, if other circumstances concur to fortify the presumption, as a settlement of accounts in the mean time. *Ibid.* *Colsel v. Budd*, 1 *Campb.* 27. The presumption may be rebutted by the defendant's admission of the debt, or by proof of payment of interest within twenty years. *Vide infra*. So by proof that the defendant has resided abroad during the whole of the time; *Newman v. Newman*, 1 *Stark.* 101;[‡] but proof of the defendant's poverty is not sufficient to rebut the presumption. *Willaume v. Gorges*, 1 *Campb.* 217. Indorsements on the bond, made by the obligee, acknowledging the receipt of interest within twenty years, are admitted to rebut the presumption, provided there be evidence that such indorsements existed before the presumption of payment arose. *Searle v. Lord Barrington*, 2 *Str.* 826. *Rose v. Bryant*, 2 *Campb.* 322, and see 2 *Phill. Ev.* 137, 1 *Stark. Ev.* 310.

[*Presumption of property.*] Proof of the possession of land, or of the receipt of rent from the person in possession, is *prima facie* evidence of seisin in fee, see *post in Ejectment*. The owner of the fee-simple is presumed to have a right to the minerals, but that presumption may be rebutted by absence of enjoyment, and user by persons not the owners of the soil. *Rowe v. Grensfel, R. and M.* 396. See *v. Brenton*, 8 *B. and C.* 737.[§] Payment of a small un-

* 16 Eng. Com. Law Reps. 12. † 5 Id. 442. ‡ 2 Id. 314. § 15 Id. 335.

varied rent for a long series of years [38] to the lord of a manor, raises the presumption that the rent is a quit rent, and not that the lord is entitled to the land. *Doe v. Johnson, Gow*, 173. A recovery in trover for a parcel of lead dug out of a mine affords no evidence of the plaintiff's possession of the mine. *B. N. P.* 33. Possession of personal chattels is *prima facie* evidence of property; see *post*, in "Assumpsit on Policy of Insurance." And see more as to the presumption of ownership, *post* "Trespass."

[*Presumption of grants, &c.*] Evidence of an adverse enjoyment of lights for twenty years or upwards, unexplained, affords a presumption of a grant to enjoy such lights. *Lewis v. Price*, 2 *Saund.* 175 (n). So an adverse unexplained enjoyment of a right of way for above twenty years, is sufficient to warrant a jury in presuming a grant of the way, though such grant must have been made within twenty-six years, all former ways being at that time extinguished by operation of an enclosure act. *Campbell v. Wilson*, 3 *East*, 294. And so where the way has been used for thirty years, a grant may be presumed, though there had been an absolute extinguishment of the right of way a few years before by unity of possession. *Keymer v. Summers*, cited 3 *T. R.* 157. Where the defendant pleaded a right of way granted by a lost deed, and the plaintiff traversed the grant, and the judge directed the jury, that if they thought the defendant had exercised the right of way uninterrupted for more than twenty years by virtue of a deed, they would find for the defendant; but, if they thought there had been no way granted by deed, they would find for the plaintiff: it was held, that this direction was right. *Levett v. Wilson*, 3 *Bingh.* 115.¹ The uninterrupted possession of a pew for thirty-six years affords a presumption of title. *Rogers v. Brooks*, cited 1 *T. R.* 431 (n). But, though uninterrupted possession of a pew in the chancel of a church for thirty years is presumptive evidence of a prescriptive right to the pew, in an action against a wrong doer, yet such presumption may be rebutted by proof, that the pew had no existence shortly before the thirty years. *Griffiths v. Matthews*, 5 *T. R.* 296. Twenty years' exclusive possession of a stream of water in any particular manner affords a conclusive presumption of right in the party enjoying it, derived from a grant or act of parliament, but less than twenty years may or may not afford such a presumption, according as it is attended with circumstances to support or rebut the right. *Per Lord Ellenborough, J. C. Bealey v. Shaw*, 6 *East*, 215. Where it had been proved, that the owners of a fishery and their lessees had for above twenty years publicly landed their nets on another's ground, and had occasionally repaired the landing-places, it was held that it was properly left to the jury to presume a grant of the right of landing nets to the owners of the fishery. *Gray v. Bond*, 2 *B. and*

¹ 11 Eng. Com. Law Reps. 57.

B. 667.— In order to establish the presumption of a grant of a way, &c. it must appear that the possession was with the acquiescence of him who was seised of an estate of inheritance; for a tenant for life or years has no power to grant such right for a longer period than during the continuance of his particular estate; *Daniel v. North*, 11 East, 372; *Barker v. Richardson*, 4 B. and A. 579;* but, if the easement existed previously to the commencement of the tenancy, the fact of the premises having been for a long time in the possession of a tenant will not defeat the presumption of a grant. *Cross v. Lewis*, 2 B. and C. 686.†

Charters and grants from the crown may be presumed from great length of possession, as for instance, 100 years, not merely in suits between private parties, but even against the crown itself, if the crown were capable of making the grant. *R. v. Brown*, cited Cowp. 110. *Mayor of Kingston v. Horner*, Cowp. 102. Where the origin of the possession is accounted for without the aid of a grant or conveyance, and is consistent with the fact of there having been no conveyance, it is a question for the jury whether in fact any conveyance has actually been executed. *Doe v. Reed*, 5 B. and A. 232,† and see post in “*Ejectment*.”

The possession of a lease by the lessor with the seals cut off, affords no presumption of a surrender. *Doe v. Thomas*, 9 B. and C. 268.†

Where a feoffment has been proved, livery of seisin may be presumed after twenty years, if possession has gone along with the feoffment; *Biden v. Loveday*, cited 1 Vern. 196, *Rees v. Lloyd*, Wightw. 123; but a less time than twenty years is not sufficient. *Doe v. Marquis of Cleveland*, 9 B. and C. 864.†

Presumption of dedication of way to the public.] If the owner of the soil throws open a passage, and neither marks by any visible distinction that he means to preserve all his rights over it, nor excludes persons from passing over it by positive prohibition, he shall be presumed to have dedicated it to the public; *Per Lord Ellenborough*, *R. v. Lloyd*, 1 Campb. 262; but proof of a bar having been placed across the street, soon after the houses which form the street were finished, will rebut the presumption of dedication, though the bar was soon afterwards knocked down, since which period the way has been used as a thoroughfare, for a dedication must be made openly, and with a deliberate purpose. *Roberts v. Karr*, 1 Campb. 262 (n). The question of dedication depends upon the time and nature of the enjoyment which persons have had of the passage over the land; therefore, where the plaintiff erected a street leading out of a highway across his own close, and terminating at the edge of the defendant's adjoining close, which was sepa-

* 6 Eng. Com. Law Reps. 308. † 6 Id. 523. † 9 Id. 221. † 7 Id. 79. † 17 Id. 380. † 17 Id. 512.

rated by the defendant's fence from the end of the street, for twenty-one years, (during the nineteen of which the houses were completed, and the street publicly watched, cleansed, and lighted: and both footways, and half the horseway, paved at the expense of the inhabitants,) it was held, that this street was not to be presumed to be so dedicated to the public, as that the defendant, pulling down his own wall, might enter it at the end adjoining to his land, and use it as a highway. *Woodyer v. Hadden*, 5 *Taunt.* 125.* It seems that there may be a limited dedication of a highway to the public. *Marq. of Staff. v. Coyney*, 7 *B. and C.* 257.†

It has been held, in one case, that six years are sufficient to found the presumption of dedication; 11 *East*, 376 (n); and where the locus in quo had been in lease for a long term up to the year 1780, and from that time till the year 1788 the public were permitted to have the free use of it, as a way, Lord Kenyon held it to be quite a sufficient time for presuming a dedication. *Trustees of Rugby Charity v. Merryweather*, 11 *East*, 376 (n). If the land is in the possession of a tenant, such tenant cannot dedicate it to the public so as to bind the owner of the fee. *Wood v. Veal*, 5 *B. and A.* 454.‡ But, after a long lapse of time, and a frequent change of tenants, Lord Ellenborough said, that from the notorious and uninterrupted use of a way by the public, he should presume that the landlord had notice of the way being used, and that it was so used with his concurrence. *R. v. Barr*, 4 *Camp.* 16. Where a public footway over crown land was extinguished by an enclosure act, but for twenty years after the enclosure took place, the public had continued to use the way, it was ruled by Bayley, J. that this user was no evidence of a dedication to the public, as it did not appear to have been with the knowledge of the crown. *Harper v. Charlesworth*, 4 *B. and C.* 574.‡

Presumption of the duration of life.] As to persons of whom no account can be given, the presumption of the duration of life ends at the expiration of seven years from the time when they were last known to be living. *Per Lord Ellenborough, Doe v. Jesson*, 6 *East*, 84; see also *Doe v. Deakin*, 4 *B. and A.* 433.¶ Proof by one of a family, that many years before, a younger brother of the person last seised had gone abroad, and that the repute of the family was, that he had died there, and that the witness had never heard in the family of his having been married, is presumptive evidence of his death without issue. *Doe v. Griffin*, 15 *East*, 293. *Doe v. Wolley*, 8 *B. and C.* 22,‡ 3 *C. and P.* 402, *S. C.* Proof that a person sailed in a ship bound for the West Indies two or three years ago, and that the ship has not since been heard of, is presumptive evidence that the person is dead; but the time of the death, if material, must depend upon the particular circumstances of the

* 1 *Eng. Com. Law Reps.* 34. † 14 *Id.* 39. ‡ 7 *Id.* 158. ¶ 10 *Id.* 412.

‡ 6 *Id.* 476. § 15 *Id.* 150.

case. *Watson v. King*, 1 Stark. 121 ;⁷ and see more as to presumption of loss of missing ship, post "Assumpsit on Policy of Insurance."

Presumption as to the legality or regularity of acts.] A person will not be presumed to have committed an unlawful act : therefore, when performances appear to have taken place at a theatre, a license was presumed, *Rodwell v. Ridge*, 1 C. and P. 220.⁸ So when a man has been elected to a corporate office, the presumption is that he has taken the sacrament according to law. *R. v. Hawkins*, 10 East, 211. So the fact of a person acting in an official capacity, as a surrogate, is *prima facie* evidence that he was duly appointed and had competent authority. *R. v. Veralot*, 3 Campb. 432. *Pritchard v. Walker*, 3 C. and P. 212.⁹ So a fact may be presumed from the regular course of a public office ; thus where it was proved that the custom-house would not permit an entry to be made, unless there had been an indorsement or a license, the license being lost, it was held, that from the entry the indorsement might be presumed. *Butler v. Allnutt*, 1 Stark. 222.¹⁰

Presumption of knowledge.] In many cases, though the fact of actual knowledge cannot be proved, it will be presumed. Thus where the rules of a club were contained in a book kept by the master of the club, every member of the club must be presumed to be acquainted with them. *Raggett v. Musgrave*, 2 C. and P. 556.¹¹ *Alderson v. Clay*, 1 Stark. 405.¹² *Wiltzie v. Adamson*, 1 Phill. Ev. 252, 6th ed.

HEARSAY.

It is a general rule of evidence, that hearsay is inadmissible ; see *Spargo v. Brown*, 9 B. and C. 935 ;¹³ since it is the mere repetition of evidence, not given under the sanction of an oath, and without the test of truth which is afforded by a cross-examination in open court. There are however certain instances in which, from the necessity of the case, hearsay is received.

Hearsay admissible in questions of pedigree. In questions of pedigree, the oral, or written declarations of deceased members of the family are admissible to prove the pedigree. Declarations in a family, descriptions in wills, inscriptions upon monuments, in Bibles, and registry books, are all admitted upon the principle that they are the natural effusions of a party who must know the truth, and who speaks upon an occasion where the mind stands in an even position without any temptation to exceed, or fall short of the truth. Per Lord Eldon, *Whitelocke v. Baker*, 13 Ves. 514. *Higham v. Ridgway*, 10 East, 120. B. N. P. 233. So a pedigree hung up in

⁷ 2 Eng. Com. Law Reps. 322. ⁸ 11 Id. 374. ⁹ 14 Id. 274. ¹⁰ 2 Id. 365.

¹¹ 12 Id. 280. ¹² 2 Id. 445. ¹³ 17 Id. 525.

a family mansion is good evidence. *Goodright v. Moss*, Cowp. 594. The declarations of a parent are good evidence to prove the time of the birth of a child; *Herbert v. Tuckal*, *T. Raym.* 84, 7 *East*, 290; but not the place of birth; *R. v. Erith*, 8 *East*, 542; and the entry of the time of a child's birth in a public register is not evidence as to the time of the birth, unless it be proved that the entry was made by the direction of the father or mother, for a clergyman has no authority to make an entry as to the time of the birth. *Wi-hen v. Law*, 3 *Stark.* 63.¹ A bill in Chancery by a father, stating his pedigree, is also admissible, in the same manner as an inscription on a tomb-stone, or in a Bible. *Taylor v. Cole*, 7 *T. R.* 3 (n). So an old and cancelled will. *Doe v. Pembroke*, 11 *East*, 504.

Hearsay, of what persons, admissible in questions of pedigree.] The hearsay must be from persons having such a connexion with the party to whom it relates, that it is natural and likely, from their domestic habits and connexions, that they are speaking the truth, and that they could not be mistaken. *Per Lord Eldon, White-locke v. Baker*, 13 *Ves.* 514. Declarations by a deceased husband as to the legitimacy of his wife, and as to the pedigree of her family, are evidence. *Vowels v. Young*, 13 *Ves.* 148. *Doe v. Harvey, R. and M.* 297. The declaration of a surgeon respecting the time of a birth at which he attended, seems to be evidence, as having been made on a matter peculiarly within his knowledge; *Higham v. Ridgway*, 10 *East*, 109; *Vin. Ab. Ev. (T. b. 91)*; 1 *Phill. Ev.* 228; but the declarations of servants and intimate acquaintances are not admissible. *Johnson v. Lawson*, 2 *Bingh.* 86,² 9 *B. Moore*, 183, *S. C.* The declarations of a deceased person as to the fact of his own marriage are evidence. *B. N. P.* 112, *R. v. Bramley*, 6 *T. R.* 330. But the declarations of a deceased mother, as to the non-access of her husband, are not evidence, for she would not have been allowed to prove that fact in person if alive. *B. N. P.* 112. *R. v. Luffe*, 8 *East*, 193. *Goodright v. Moss*, Cowp. 594.

Hearsay in questions of pedigree not admissible post litem motam.] If the declarations have been made after a controversy has arisen with regard to the point in question, they are inadmissible. *Berkeley Peerage case*, 4 *Campb.* 401. *Banbury v. Peerage case*, 2 *Sehn. N. P.* 712, 4th ed. It is not necessary, in order to exclude the evidence, to show that the controversy was known to the person making the declaration. 4 *Campb.* 417.

Hearsay admissible to prove public rights, and rights in the nature of public rights.] Hearsay, or common reputation, is admissible to prove public, or general rights. See the *Berkeley Peerage case*, 4 *Campb.* 415. *Weeks v. Sparke*, 1 *M. and S.* 686. *Morewood*

¹ 14 Eng. Com. Law Reps. 163. ² 9 Id. 329.

v. Wood, 14 *East*, 329. So it is admissible to prove a right affecting a number of persons, and which is therefore in the nature of a public right; as a manorial custom; *Denn v. Spray*, 1 *T. R.* 466; the boundaries between parishes or manors; *Nichols v. Parker*, 14 *East*, 331; or a *Modus*; *Weeks v. Sparke*, 1 *M. and S.* 691; but to prove a prescriptive right, strictly private, it is doubtful whether hearsay evidence is admissible. *Morewood v. Wood*, 14 *East*, 327. *Outram v. Morewood*, 5 *T. R.* 123. *Withnell v. Gartham*, 1 *Esp.* 324. *B. N. P.* 295. *Blackett v. Lowes*, 2 *M. and S.* 494. 1 *Phill. Ev.* 238. 1 *Stark. Ev.* 61. On a question whether a certain road was a highway, a copperplate map was produced, in which it was so described. It purported to have been taken by the direction of the churchwardens. The plaintiff offered to prove that it was generally received in the parish as an authentic map, but Lord Kenyon rejected the evidence. *Pollard v. Scott, Peake*, 18. Though general reputation is evidence, yet the tradition of a particular fact is not. *Weeks v. Sparke*, 1 *M. and S.* 687. *Ireland v. Powell, Peake Ev.* 15. *Cooke v. Banks*, 2 *C. and P.* 481.¹ Before a customary right, &c. can be proved by evidence of reputation, a foundation must be laid by showing acts of ownership, and then the evidence of reputation becomes admissible, such evidence being confined to what old persons, who were in a situation to know what these rights are, have been heard to say concerning them. *Ibid.* These declarations, as in questions of pedigree, must not have been made *post litem motam*. *R. v. Cotton*, 3 *Campb.* 444. Though where, in a suit as to the custom of a manor, it is attempted to give in evidence depositions in a former suit, relative to a custom of the same manor, it is no objection that the depositions taken in the former suit were *post litem motam*, if the two suits were not upon the same custom; and where the former suit is very ancient, it is unnecessary to prove by extrinsic evidence that the witnesses who made the deposition were in the situation in which they profess to stand, or that they had the means of becoming acquainted with the customs of the manor. *Freeman v. Phillips*, 4 *M. and S.* 486. Declarations of old persons concerning the boundaries of parishes and manors have been admitted in evidence, although the old persons were parishioners, and claimed right of common on the wastes, which their declarations had a tendency to enlarge. *Nicholls v. Parker*, 14 *East*, 331. So declarations on a question of parochial *modus* were received, though the deceased was a parishioner and liable to pay tithe. *Harewood v. Sims*, 1 *Wightw.* 112. *Deacle v. Hancock*, *McClel.* 85, 13 *Price*, 226, *S. C.*

[*Hearsay admissible when part of the transaction.*] When hearsay is introduced, not as a medium of proof in order to establish a distinct fact, but as being in itself a part of the transaction in question, it is then admissible; for to exclude it might be to exclude

¹ 12 *Eng. Com. Law Reps.* 225.

the only evidence of which the nature of the case is capable. Thus in case for a false representation of the solvency of A. B., whereby the plaintiffs trusted him with goods; their declarations at the time, that they trusted him in consequence of the representation, are admissible in evidence for them. *Fellowes v. Williamson*, 1 *M. and M.* 306. So in an action against the drawer of a bill of exchange, what is said by the drawee on the bill being presented when due is evidence, but what passed between the drawee and the holder afterwards is not admissible. *Prideaux v. Collier*, 2 *Stark*, 57¹. So declarations made by a trader at the time of his absentsing himself from home are admissible on a question as to his bankruptcy, to show the motive of his absence. *Bateman v. Bailey*, 5 *T. R.* 512, *B. N. P.* 40. And in an action to recover money paid by a bankrupt, in contemplation of bankruptcy, his declarations as to the state of his affairs made about the time of the transaction, but unconnected with it, are admissible for the plaintiff. *Vacher v. Cocks*, 1 *M. and M.* 358. *Herbert v. Wilcocks*, *Id.* 355 (n). So answers to letters written by the bankrupt requesting assistance, may be read to prove the refusal to give assistance. *Vacher v. Cocks*, 1 *M. and M.* 358. So in actions of assault, evidence of what the plaintiff said immediately on receiving the hurt is admissible. *Thompson v. Trevanion*, *Skin.* 402, 6 *East*, 193. In an action also for criminal conversation, the declarations of a wife at the time of her elopement, that she fled from immediate terror of personal violence from her husband, seem to be evidence against him. See *Aveson v. Kinnaird*, 6 *East*, 193. And where in a similar action the defence was, that the plaintiff had connived at his wife's elopement, evidence was received on behalf of the plaintiff, of the wife's declaration as to her intention in going. *Hoare v. Allen*, 3 *Esp.* 276. In an action for breach of promise in marriage, if the defendant relies upon the general bad character of the plaintiff, a witness may be examined as to representations made to him by third persons. *Foulkes v. Selway*, 3 *Esp.* 236.

Ancient documents, in what cases admissible.] Where the contents of an ancient deed, or document, raise a presumption of a particular fact, evidence of such deed, or instrument, is admissible in proof of the fact. Thus, where the question was whether certain lands within a manor were subject to a right of common, counterparts of old leases, preserved among the muniments of the lord of the manor, by which the land appeared to have been demised by the lord free from such charge, were allowed to be evidence for the plaintiff, claiming under the lord of the manor, to prove that at the time of their respective dates, the lord had granted the land free from common, though possession under the leases was not shown. *Clarkson v. Woodhouse*, 5 *T. R.* 412 (n). 3 *Dougl. S. C.* So old entries of licenses on the court-rolls of a manor, stating that the

¹ 3 *Eng. Com. Law Repts.* 242.

lords of the manor had the several fishing in a navigable river, and had granted liberty of fishing for certain rents, were held admissible to prove a prescriptive right in the plaintiffs, claiming under the lords of the manor, without proof of payment under the licenses; but such evidence is not entitled to any weight unless it be shown that in later times payments have been made under similar licenses, or that the lords of the manor had exercised other acts of ownership which have been acquiesced in. *Rogers v. Allen*, 1 Camp. 309. An old deed between a public body claiming tolls and others liable thereto, regulating the amount of payment, is evidence of the existence of the tolls. *Brett v. Beales*, 1 M. and M. 416.

Hearsay of persons having no interest to misrepresent, in what cases admissible.] What a man writes or says for himself, cannot be evidence for himself or his representative. *Glyn v. Bank of England*, 2 Ves. 43. *R. v. Debenham*, 2 B. and A. 187. Therefore entries made by a deceased person, under whom the defendant claims, acknowledging the receipt of rent for the premises in question, are not admissible evidence for the defendant. *Outram v. Morewood*, 5 T. R. 123. So on a question whether the appointment of a curate belongs to the vicar or to a corporation, entries in old books belonging to the corporation are not evidence for them. *Attorney Gen. v. Corporation of Warwick*, 4 Russ. 222. So a survey of a manor made by the owner is not evidence against a stranger in favour of a succeeding owner; *Anon.* 1 Str. 95; but where A. seized of the manors of B. and C., causes a survey to be taken of the manor of B., which is afterwards conveyed to E., and after a long time there are disputes between the lords of the manors of B. and C. about their boundaries, this old survey may be given in evidence. *Bridgman v. Jennings*, 1 Ld. Raym. 734. Entries by a deceased rector, or vicar, as to the receipt of ecclesiastical dues, are admissible for his successor, on the ground that he has no interest to mis-state the fact. *Le Grose v. Lovemoor*, 2 Gwill. 529. *Armstrong v. Hewit*, 4 Price, 218. And even where the entries have been made by deceased improper rectors, they have been admitted as evidence for their successors, though objected to as coming from the owners of the inheritance. *Anon. Bunb.* 46, *Illingworth v. Leigh*, 4 Gwill. 1618. But the reception of this evidence has given rise to much observation. See the cases cited 1 Phill. 247 (n).

An attorney's bill with an indorsement upon it. "March 4, 1815, delivered a copy to C. D.," which indorsement is proved to be in the handwriting of a deceased clerk of the plaintiff's (whose duty it was to deliver a copy of the bill), and which is proved to have existed at the time of the date, has been held to be evidence to prove the delivery of the bill. *Champneys v. Peck*, 1 Stark. 404.* In a late case, Best, C. J. is said to have been of opinion, that a banker's

* 2 Eng. Com. Law Reps. 445.

ledger was receivable in evidence, in an action between the assignees of a customer and a third party, to show that the customer at a certain time had no funds in the banker's hands. *Furness v. Cope*, 5 Bingham 114.¹

Hearsay of persons speaking against their own interest admissible.] In a variety of cases the declarations of deceased persons, made against their own interest, have been admitted. See the cases collected 2 Russell, 67 (n). Thus entries by a deceased steward of money received by him from different persons, in satisfaction of trespasses committed on the waste, are admissible to prove that the right to the soil of the waste was in his master. *Barry v. Bebbington*, 4 T. R. 514. *Wynne v. Tyrwhitt*, 4 B. and A. 376.* So a bill of lading signed by a deceased master of a vessel, for goods deliverable to a consignee, is evidence of property in the consignee, even in trover for the goods against a third person. *Per Lawrence, J., Haddow v. Parry*, 3 Taunt. 305. So also a declaration by a deceased occupier of land that he rented it under a certain person, is evidence of that person's seisin. *Uncle v. Watson*, 4 Taunt. 16. *Doe v. Jones*, 1 Campbell 367. *Davies v. Peirce*, 2 T. R. 53. *Doe v. Green, Gow*, 227. Entries made by a deceased collector of rates, charging himself with the receipt of money, and made by him in the public books of his office, are admissible against his surety to prove the receipt. *Goss v. Wallington*, 3 B. and B. 132.* And the same has been held with regard to the entries of a clerk. *Whitnash v. George*, 8 B. and C. 556.* So entries in the land-tax collector's books, stating A. B. to be rated for a particular house, and his payment of the sum rated, are evidence to show that A. B. was occupier of the premises at the time. *Doe v. Cartwright, R. and M.* 62.

Upon the same principle, entries by a deceased shopman or servant, in his master's books, stating the delivery of goods, are evidence for his master of such delivery. *Price v. Lord Torrington*, 1 Salk. 285. In order to render such entries evidence, it must appear that the shopman is dead; that he is abroad and not likely to return is not sufficient. *Cooper v. Marsden*, 1 Esp. 1. By stat. 7 Jac. I. c. 12, the shop-book of a tradesman shall not be evidence in any action for wares delivered, or work done above one year before the bringing of the action, except the tradesman or his executor shall have obtained a bill of debt, or obligation of the debtor for his said debt, or shall have brought against him some action within a year next after the delivery of the wares, or the work done. See *Sikes v. Marshall*, 2 Esp. 705. Where the effect of the entry is not to charge the servant it is not evidence: thus in an action for the hire of horses, an entry by the plaintiff's servant, since dead, stating the terms of the agreement with the defendant, is not evidence. *Calvert v. Archbp. of Cant.* 2 Esp. 646.*

¹ 15 Eng. Com. Law Reps. 387. = 6 Id. 452. * 7 Id. 379. • 15 Id. 295.

* Though, in England, the shop-book of a tradesman is not evidence of a debt,

ADMISSIONS.

The express admissions of a party to the suit, or admissions implied from his conduct, are strong evidence against him; but he is at liberty to prove that such admissions were mistaken or untrue, and is not estopped or concluded by them, unless another person has been induced by them to alter his condition; in such case the party is estopped from disputing their truth, with respect to that person and those claiming under him in that transaction, but as to third persons he is not bound. *Per Bayley, J. Heane v. Rogers*, 9 B. and C. 586.

An acknowledgment of a party's hand-writing, though made pending a treaty of compromise, is evidence against him. *Waldridge v. Kennison*, 1 Esp. 143. So facts admitted before arbitrators. *Gregory v. Howard*, 3 Esp. 113. *Doe v. Evans*, 3 C. and P. 219.^a An offer of a specific sum by way of compromise is admissible, unless accompanied with a caution that the offer is confidential. *Wallace v. Small*, 1 M. and M. 446; *Watts v. Lawson*, *Ibid.* 447 (n); but see *Slack v. Buchanan*, *Peake*, 5. An answer to a bill in Chancery filed against the defendant by a stranger, may be read to show the admission of a particular fact, though it is not evidence of a judicial proceeding. *Grant v. Jackson*, *Peake*, 203. The examination of a party, signed by him, before commissioners of bankrupt is evidence against him, though part only of his depositions was noted down. *Milward v. Forbes*, 4 Esp. 172. So testimony given in court, admitting a particular fact, may be used in an action against the witness, though he was prevented from entering into an explanation of the circumstances under which the fact took place, it being irrelevant. *Collett v. Lord Keith*, 4 Esp. 212. An inventory exhibited by an administrator in the Ecclesiastical Court, is evidence of assets to the amount stated. *Hickey v. Hayter*, 1 Esp. 313. An acknowledgment by a defendant that his trade is a nuisance is admissible, though not conclusive evidence against him, on an indictment for carrying on the same trade in another place. *R. v. Neville*, *Peake*, 91. If A. having title to premises in the possession of B. suffer B. to make alterations inconsistent with such title, it is evidence to go to the jury that A. has recognised the right of B. *Doe v. Pye*, 1 Esp. 364. So where upon a building lease of 50 feet, more or less, the lessee takes sixty-two feet and a half, but the ground taken agrees with the abutments in the lease, and the lessor sees the progress of the building without objection, this is evidence to go to the jury of an acquiescence. *Neale v. Parkin*, 1 Esp. 229. In an action on a bill of exchange,

without the assistant oath of the clerk who made the entry; yet here, from the necessity of the case, as business is often carried on by the principal, and many of our tradesmen do not keep clerks, the book, proved by the oath of the plaintiff himself, has always been admitted. *Poultney v. Ross*, 1 Dall. 238. But such evidence is not to be extended beyond former limits. *Thompson v. M'Elvey*, 13 Serg. and R. 126.

^a 17 Eng. Com. Law Reps. 449. • 14 Id. 278.

evidence of an admission by the plaintiff, that he had no interest in the suit, is a ground of nonsuit. *MS. Archb. Pl. and Ev.* 346. So an admission by the lessor of the plaintiff, in ejectment, that he had assigned his interest in the premises. *Doe v. Watson*, 2 *Stark.* 230.* Letters written by a party are evidence against him, without producing those to which such letters are answers. *Lord Barrymore v. Taylor*, 1 *Esp.* 326. The contents of a written instrument cannot be proved against a party by his admission, unless the non-production of it be accounted for. *Bloxam v. Elsie, R. and M.* 187. So an admission in an answer in Chancery of the execution of a deed, is only secondary evidence, and does not supersede the necessity of proving it in the regular way. *Call v. Dunning*, 4 *East*, 153. *Cunliffe v. Sefton*, 2 *East*, 187, 188. But see *Bowles v. Langworthy*, 5 *T. R.* 366. But this objection does not apply where the party enters into an admission with a view to the trial of the cause. 2 *Stark. Ev.* 37. A declaration by the payee of a note payable on demand (the note being then in his possession,) that he gave no consideration for it to the maker, is not admissible in an action by an indorsee against the maker, the payee being alive. *Barough v. White*, 4 *B. and C.* 325.* *Smith v. De Wruitz, R. and M.* 212.

Admissions may sometimes be presumed from the silence of a party, when certain statements are made;* but the deposition of a witness, taken in a judicial proceeding against a party, is not evidence in another proceeding against that party, on the ground that he had been present, and had not cross-examined the witness. *Mellen v. Andrews*, 1 *M. and M.* 336.

A notice signed by partners, stating that the partnership "has been dissolved," is evidence against them of the dissolution, though the partnership was by deed. *Doe v. Miles*, 1 *Stark*, 181.* 4 *Camp.* 373. *S. C.*

Receipts.] The acknowledgment in a deed of the receipt of money, is conclusive evidence, against the party executing the deed, of such receipt. *Baker v. Dewey*, 1 *B. and C.* 704.* *Rowntree v. Jacob*, 2 *Taunt.* 141. But see *Stratton v. Rastall*, 2 *T. R.* 366. But such receipt will not be conclusive, if the recitals of the deed show that the money is not paid. *Lampon v. Corke*, 5 *B. and A.* 607.* 1 *D. and R.* 211. *S. C.* Nor is the receipt indorsed on the back of a deed conclusive. *Per Holroyd*, *J.* 5 *B. and A.* 611.* In general, a receipt not under seal, is only a *prima facie* acknowledgment that the money has been paid. *Skaife v. Jackson*, 3 *B. and C.* 421.* Though it has been ruled, both by Lord Kenyon and Lord Ellenborough, that a receipt in full of all demands given with a knowledge of all the circumstances, is conclusive. *Bristow v. Eastman* 1 *Esp.*

* 3 *Eng. Com. Law Reps.* 323. * 10 *Id.* 345. * 2 *Id.* 347. * 8 *Id.* 193.

* 7 *Id.* 206. * 7 *Id.* 207. * 10 *Id.* 137.

* Nothing can be more dangerous than this kind of evidence. It should always be received with caution, and never ought to be, unless the evidence is of that kind which naturally calls for contradiction; some assertion made to the man with respect to his right, which by his silence he acquiesces in. *Per Duncan J.* in *Moore v. Smith*, 14 *Serg. and R.* 393.

172. *Aher v. George*, 1 *Campb.* 392. As between the underwriter and the assured, the acknowledgment in the policy of the receipt of the premium is conclusive. *Dalzell v. Main*, 1 *Campb.* 532. If an agent employed to receive money, and bound, by his duty to his principal, from time to time communicate to him whether the money is received or not, renders an account, from time to time, which contains a statement that the money is received, he is bound by that account, unless he can show that the statement was made unintentionally, and by mistake. *Per Bayley, J. Shaw v. Picton*, 4 *B. and C.* 729.* A receipt does not exclude parol evidence of the payment. *Per Lord Ellenborough, Rambert v. Cohen*, 4 *Esp.* 213. Where the plaintiff entered an account in writing of goods and cash furnished to the defendant from time to time, each page of which was authenticated by the defendant's acknowledgment in writing, of the receipt of the contents, it was held, that though such an acknowledgement in writing could not be given in evidence, *per se*, in respect of the cash items amounting to above 40s. in each page, for want of receipt stamps, yet that it was competent to the plaintiff to prove, that upon calling over each article to the defendant, he admitted that he had received the same, and that the witness might refresh his memory by referring to the accounts. *Jacob v. Lindsay*, 1 *East*, 460.

Admissions of particular character, and admissions made in a particular character.] The character in which the plaintiff sues, or in which the defendant is sued, is frequently proved by the defendant's admissions. Thus, if B. has dealt with A. as farmer of the post-horse duties, it is evidence in an action by A. against B., to prove that he is such farmer. *Radford v. Mackintosh*, 3 *T. R.* 682. And see *Peacock v. Harris*, 10 *East*, 104. So in an action for slandering the plaintiff in his profession of an attorney, the words themselves importing that the defendant would have the plaintiff struck off the roll of attorneys, were held to be an admission of the plaintiff's character as attorney. *Berryman v. Wise*, 4 *T. R.* 366. *Pearce v. Whale*, 5 *B. and C.* 39.* And see *Smith v. Taylor*, 1 *N. R.* 196. So an admission by a defendant that a third person has become bankrupt, (as where an auctioneer advertised for sale "the property of J. S. a bankrupt,") is evidence of the title of the assignees, in an action brought by them against the defendant. *Maltby v. Christie*, 1 *Esp.* 340. *Booth v. Coward*, 1 *B. and A.* 677; and see post, "Actions by assignees of bankrupts." So where the defendant, with a view to obtaining a commission against the party, swore to an affidavit stating that he had become bankrupt. *Ledbetter v. Salt*, 4 *Bingh.* 623, * 1 *M. and P.* 597, *S. C.* And see *Harmer v. Davis*, 7 *Taunt.* 577.^b So it has been held that a bankrupt who has petitioned for his discharge under stat. 49 Geo. III. c. 121. s. 14, cannot, in an action against his assignees, dispute the

* 10 Eng. Com. Law Reps. 443. • 11 *Id.* 138. • 15 *Id.* 91. • 2 *Id.* 223.

validity of the commission. *Watson v. Wace*, 5 B. and C. 153. See also *Clarke v. Clarke*, 6 Esp. 61, *Like v. Howe*, 6 Esp. 20. But where the admission that he has become bankrupt, is made in the course of a transaction with third persons, the bankrupt is not thereby estopped from showing, in an action against his assignees, that he has not become bankrupt. *Heane v. Rogers*, 9 B. and C. 577.⁴ Nor is he precluded from disputing the commission by surrendering, or by petitioning the Chancellor to enlarge the time for surrendering. *Mercer v. Wise*, 3 Esp. 219. So as against a creditor the merely proving a debt under the commission is not such an admission as will dispense with the regular proof of the bankruptcy. *Rankin v. Horner*, 16 East, 191. In the case of peace-officers, justices of the peace, constables, &c., it is sufficient to prove that they acted in those characters, without producing their appointments. *Per Buller, J., Berryman v. Wise*, 4 T. R. 386. So in an information against a military officer, for false musters, the returns in which he described himself to be such officer are evidence of the fact. *R. v. Gardner*, 2 Campb. 513. So also in an action for penalties against a collector of taxes, proof of the defendant having collected the taxes is sufficient proof of his being collector, though the appointment is by warrant under an act of parliament. *Lister v. Priestley*, *Wightw.* 67.

In an action by assignees of a bankrupt, admissions made by them before their appointments are inadmissible. *Fenwick v. Thornton*, 1 M. and M. 51. So an admission by one of several trustees will not bind his co-trustees. *Davies v. Ridge*, 3 Esp. 102. And an admission by an individual of a corporation will not bind the corporate body. *Mayor of London v. Long*, 1 Campb. 23.

Admissions by persons, not parties to the suit, but interested.] An admission is evidence, whether made by a nominal party who sues for the benefit of another, *Bauerman v. Radenius*, 7 T. R. 664, or by the person really interested, but not named on the record. *R. v. Hardwick*, 11 East, 578. Thus, in an appeal, declarations by the rated inhabitants of either parish are admissible, for they are in fact parties, though the appeal is entered in the names of the parish officers. *Ibid.* So in an action on a bond conditioned for the payment of money to L. D., the declaration of L. D. that the defendant owes nothing is evidence. *Hanson v. Parker*, 1 Wils. 257. So in an action by the master of a ship for freight, brought for the benefit of the owner, the admissions of the latter are evidence. *Smith v. Lyon*, 3 Campb. 465. So in actions on policies, the declarations of the parties really interested. *Per Lord Ellenborough, Bell v. Ansley*, 16 East, 143. So in an action against the sheriff, the declarations of a party who has indemnified the sheriff, are evidence against the defendant. *Duke v. Aldridge*, cited 7 T. R. 665. So again in trover for a deed which the defendant admitted he detained

at the request of W. R., and in the detainer of which W. R. was substantially interested, the declarations of W. R. in favour of the plaintiff's claim are admissible. *Harrison v. Vallance*, 1 Bingh. 45; * and see *Robson v. Andrade*, 1 Stark. 372.¹ But in an action for contribution, by one of several sureties in a bond, against another, the declarations of the obligee as to payments, not made at the time of payment, are inadmissible. *Dunn v. See Holt*, 401.²

Admissions by guardian and prochein amy.] The admissions of a guardian are not evidence against an infant who sues by his guardian. *Cowling v. Ely*, 2 Stark. 366.³ And so of the admission of prochein amy. *Webb v. Smith, R. and M.* 106.

Admissions by agents.] Where a party to the suit constitutes a third person his agent for the purpose of the admission, the admission so made is evidence. Thus if a person agrees to admit a claim, provided J. S. will make an affidavit in support of it, such affidavit has been ruled to be conclusive. *Lloyd v. Willan*, 1 Esp. 178. *Stevens v. Thacker, Peake*, 187. But to render such an affidavit conclusive, the evidence should be very clear. *Garnett v. Ball*, 3 Stark. 160.⁴ So if the vendee of goods denies having received them, but adds, "If the carrier's servant says he delivered the goods, I will pay you," the answer of the servant, when applied to on the subject, may be given in evidence after his death. *Daniel v. Pitt*, 1 Campb. 366 (n.) So where an executor refers a creditor of the testator to J. S. for information respecting the assets, the admission of J. S. is evidence, and he need not be called. *Williams v. Innes*, 1 Campb. 364. So where a party being applied to for payment says, "A. will pay you," an admission by A. is sufficient to bind the principal, and A. need not be called. *Burt v. Palmer*, 5 Esp. 145. With regard to the admissions of agents in general, the rule is this: When it is proved, that A. is agent to B., whatever A. does or says, or writes in the making of a contract as agent of B., is admissible in evidence, because it is part of the contract which he makes for B., and which therefore binds him, but it is not admissible as the agent's account of what passes. *Per Gibbs, J. Langhorne v. Allnut*, 4 Taunt. 519. Thus the declaration of a servant employed to sell a horse, is evidence to charge the master with a warranty, if made at the time of sale; if made at any other time, the facts must be proved by the servant himself. *Helyear v. Hawke*, 5 Esp. 72; and see *Peto v. Hague*, 5 Esp. 134. But the admissions of an agent not made at the time of the transaction, but subsequently, are not evidence; thus the letters of an agent to his principal, containing a narrative of the transactions in which he had been employed, are not admissible in evidence against the principal. *Ibid. Kahl v. Jansson*, 4 Taunt. 565, and see *Fairlie v. Hastings*, 10 Ves. 128. Be-

* 3 Eng. Com. Law Reps. 239. ¹ 2 Id. 432. ² 3 Id. 140. ³ 3 Id. 385.

⁴ 14 Id. 174.

tham v. Benson, 1 *Gow*, 45.² But a letter from an agent abroad stating the receipt of money, coupled with the answer of the principal directing the disposition of the money, will be evidence of the receipt by the principal. *Coates v. Bainbridge*, 5 *Bingh.* 58.¹ It is said to have been ruled at nisi prius, that where A. had ordered goods of B. to be delivered to C., an acknowledgment of the receipt by C. was evidence against A., *Biggs v. Laurence*, 3 *T. R.* 454: but Lord Kenyon frequently ruled the contrary; see *Bauerman v. Radenius*, 7 *T. R.* 665. 10 *Ves.* 128, in which he was followed by Lord Ellenborough. *Evans v. Beattie*, 5 *Esp.* 26; and see *Bacon v. Chesney*, 1 *Stark.* 192.² The admission by an under-sheriff of an escape is evidence against the sheriff; *Yabsley v. Doble*, 1 *Ld. Raym.* 180. and see *Drake v. Sykes*, 7 *T. R.* 117; and the admissions of a bailiff are evidence against the sheriff, like the statements of any other agent, when they form part of the transaction. *North v. Miles*, 1 *Campb.* 389. The admissions of a surveyor to a corporation respecting a house belonging to the corporation, are admissible against the latter. *Peyton v. Governor of St. Thomas's hospital*, 3 *C. and P.* 363.² In all cases, before the admissions of an agent can be given in evidence, the fact of his agency must be proved, and evidence that the party has acted as agent in other instances, in which the principal has recognised his acts, will be evidence of a general authority. *Neale v. Irving*, 1 *Esp.* 61. *Watkins v. Vince*, 2 *Stark.* 368.² It must appear that the admission was made with regard to a matter within the scope of the agent's authority. *Schumack v. Lock*, 10 *B. Moore*, 39.²

Admissions by counsel or attorney.] Where, after a verdict subject to a special case, a new trial has been directed, the special case, signed by the counsel on each side, is evidence of the facts there stated. *Van Wart v. Wolley, R. and M.* 4. An admission made by an attorney of one of the parties to prevent the necessity of proving a fact on the trial, is sufficient evidence of that fact; *Young v. Wright*, 1 *Campb.* 141; as where he admits the handwriting of the attesting witness, it is sufficient proof of the execution of a deed; *Mikward v. Temple*, 1 *Campb.* 375; and see *Truslove v. Burton*, 9 *B. Moore*, 64;² but statements made by the attorney in the course of conversation are not admissible. *Young v. Wright*, 4 *Campb.* 140. Admissions made by the defendant's attorney respecting the plaintiff's demand (the attorney refusing to be examined) are evidence against the defendant, and proof that they were made by the attorney on the record, will be sufficient to establish his agency. *Gainsford v. Grammar*, 2 *Campb.* 9. An undertaking to appear "for Messrs. T. and M., joint owners of the sloop A.," given by the attorney on record, in evidence of the joint ownership. *Marshall v. Cliff*, 4 *Camp.* 133.

¹ 5 Eng. Com. Law Reps. 454. ¹⁵ Id. 368. ² 2 Id. 352. ³ 14 Id. 349.
⁴ 3 Id. 366. ⁵ 17 Id. 133. ⁶ 17 Id. 121.

Admissions by partner.] After *prima facie* evidence of partnership, the declaration of one partner is evidence against his copartners: *Nicholls v. Dowding*, 1 Stark. 81;* though the former is no party to the suit; *Wood v. Bradick*, 1 Taunt. 104; but see *Rooth v. Jauney*, 7 Price, 198; and it is evidence, though made after the dissolution of the partnership, if made as to a transaction which took place before the dissolution, *ibid.*;* but not to bind his copartner as to a transaction which occurred previously to the partnership, unless a joint responsibility be proved as a foundation for the evidence. *Catt v. Howard*, 3 Stark. 3.† A declaration by one of several partners, joint plaintiffs, that the goods, the subject matter of the suit, were his separate property, is evidence against all the plaintiffs; *Lucas v. Delacour*, 1 M. and S. 249; but an admission by a partner as to a subject not of copartnership, but of conjoint ownership in a vessel, is not binding on his copartner. *Jaggers v. Bennings*, 1 Stark. 64.‡

Admissions by wife.] In general, the admissions of the wife will not bind the husband. Thus the wife's receipt for wages earned by her is not evidence against the husband. *Hill v. Hill*, 2 Str. 1094; and see *Alban v. Pritchett*, 6 T. R. 680. But where the wife can be considered the agent of her husband, her admissions may be received as evidence against him. *Emerson v. Blonden*, 1 Esp. 142. *Anderson v. Sanderson*, 2 Stark. 204.† *Holt*, 591. S. C.‡ Thus in an action for goods sold and delivered at the defendant's shop, an offer made by the wife to settle the demand is admissible in evidence, she being accustomed to serve in the shop, and to transact the business in her husband's absence. *Clifford v. Burton*, 1 Bing. 199.‡ 8 B. Moore, 16. S. C. So in an action against the husband for goods sold, an acknowledgment by the wife, (who managed the business, and generally gave orders and paid for goods,) within six years, was held sufficient to take the case out of the statute of limitations. *Palethorpe v. Furnish*, 2 Esp. 511 (n). Where the conduct of the wife is in question, her declarations have been held admissible for her husband in an action against him. Thus in an action for necessities supplied to the wife, the defence being that the husband had turned her out of doors for adultery, her declarations as to the adultery, made previously to her expulsion, were admitted by Abbott C. J. *Walton v. Green*, 1 C. and P. 621.‡

Admissions by payment of money into Court.] Payment of money into court by the defendant, is an admission that the plaintiff has a legal demand to the extent of the money brought in; *Blackburn v. Scholes*, 2 Campb. 241; but not beyond that extent; and

* 2 Eng. Com. Law Reps. 305. † 14 Id. 143. ‡ 2 Id. 297. § 3 Id. 314.

¶ 3 Id. 190. * 8 Id. 294. † 11 Id. 498.

‡ The acknowledgment of a debt by one partner, after a dissolution of the copartnership, is not sufficient to take the case out of the statute of limitations as to the other partners. *Bell v. Morrison*, 1 Peters Rep. 352.

therefore the payment into court upon a count on a valued policy, in which the loss is averred to be total, is no admission of a total loss. *Rucher v. Palsgrave*, 1 *Campb.* 557. 1 *Taunt.* 419, S. C. Where there is a special contract, the payment into court admits that contract; but where, as in the common *indebitatus assumpsit*, the demand is made up of several distinct items, the payment admits no more than that the sum paid in is due. *Per Gaselee J. Seaton v. Benedict*, 5 *Bingh.* 32.* It is a conclusive admission of the character in which the plaintiff sues; *Lipscombe v. Holmes*, 2 *Campb.* 441; and of the plaintiff's right to sue in the court in which the action is brought. *Miller v. Williams*, 5 *Esp.* 19. In an action on a bill of exchange, it admits the handwriting of the parties; *Gutteridge v. Smith*, 2 *H. B.* 374; and the sufficiency of the stamp. *Israel v. Benjamin*, 3 *Campb.* 40. In an action on a guarantee, the payment of money into court, on a plea of tender, admits an agreement signed according to the statute of frauds. *Middleton v. Brewer, Peake*, 15. In an action of covenant, it admits the execution of the deed; *Randal v. Lynch*, 2 *Campb.* 356, 357; and where two breaches are assigned in one count, payment into court on one of the breaches is an admission of the whole contract, as set out in that count, so as to enable the plaintiff to recover on the second breach without proof of the contract. *Dyer v. Ashton*, 1 *B. and C.* 3.† It admits a contract for goods sold and delivered, where the goods were tortiously converted by the defendant, and the plaintiff has declared for goods sold and delivered. *Bennet v. Francis*, 2 *B. and P.* 550, 4 *Esp.* 28, S. C. In an action for goods sold by sample at a stipulated price, after payment of money into court, the defendant cannot insist on the inferiority of the goods. *Leggatt v. Cooper*, 2 *Stark.* 103.‡ Where the declaration states a contract to pay a particular sum of money for certain articles, payment of part of the money into court, by admitting the contract, admits also the sum originally due; and the only question is, whether the remainder of the money had been previously paid; *Cox v. Brain*, 3 *Taunt.* 95, 2 *B. and A.* 118; but where the declaration is for goods sold, to be paid for at the average price, to be ascertained on a day specified, payment into court does not admit the average price to be as stated in the declaration; *Stoveld v. Brewer*, 2 *B. and A.* 116; see also *Everth v. Bell*, 7 *Taunt.* 450;§ and payment of money into court on several counts, one of which only is applicable to the plaintiff's demand, admits a cause of action on that count only. *Per Best C. J. Stafford v. Clark*, 2 *Bingh.* 383.¶ In an action against a carrier for not carrying goods safely, if the defendant has restricted his liability by a notice that he will not be accountable for more than 5*l.* (unless entered and paid for accordingly), the payment of 5*l.* into court does not admit a liability beyond that sum. *Clarke v. Gray*, 6 *East*, 570. *Yate v. Willan*, 2 *East*, 128, and see 1 *Phill. Ev.* 178. Where the defendant pleads the general issue, and the

* 15 *Eng. Com Law Reps.* 354. † 3 *Id.* 4. ‡ 3 *Id.* 266. § 2 *Id.* 171. ¶ 9 *Id.* 437.

statute of limitations, and pays money into court generally, such payment does not take the case out of the statute. *Long v. Greville*, 3 B. and C. 10.* If the plaintiff declares on an illegal contract, the defendant cannot give it validity by his admission; and if money is paid into court generally, and the plaintiff insists on several claims, some legal and others illegal, the court will apply the payment to the legal claim. *Ribbans v. Crichett*, 1 B. and P. 264. If the plaintiff misleads the defendant, and induces him to suppose that the only point to be tried is a question of fraud, the court will not permit him to take advantage of the payment of money into court, so as to exclude evidence of the fraud. *Muller v. Hartshorn*, 3 B. and P. 556. Payment of money into court must be proved by the production of the rule of court. *Israel v. Benjamin*, 3 Campb. 40.

Admissions by recital.] A recital in a deed is evidence against him who executed the deed, or any person claiming under him. *Com. Dig. Evid. (B. 5.)*, and see *Rees v. Lloyd*, *Wightw.* 123. Thus the recital of a lease in a release is evidence of the lease against the releasor and those claiming under him. *Ford v. Grey*, 1 Salk. 286; but see *Peake, Ev.* 108, 5th edit. So in trespass against a sheriff, a bill of sale reciting the writ, the taking, and the sale of the goods, is evidence against him of those facts. *Woodward v. Larking*, 3 Esp. 286. So the recital of an ancient charter in a modern charter is evidence. *Per Abbott, J. Gervois v. the Grand Western Canal Comp.* 5 M. and S. 78. The recitals in a deed may confine the effect of other admissions in the same instrument. *Lampon v. Corke*, 5 B. and A. 607.† 1 D. and R. 211, S. C.

Admissions on the record.] Whatever is admitted on the record need not be proved, and cannot be disproved; *B. N. P.* 298; but an admission as to one of several issues, does not operate as an admission to any other. *Harrington v. Macmorris*, 5 Taunt. 228. Whatever is pleaded and not denied, shall be taken to be admitted. *Wimbish v. Tailbois*, *Plow.* 48. Thus if the defendant in replevin avow the taking of the cattle, damage feasant, in the *locus in quo* as parcel of the manor of K., and the plaintiff make title to the manor of K., and traverse that the manor is the freehold of the defendant, he cannot afterwards prove that K. is no manor, for that is admitted by the traverse. *B. N. P.* 298. If the defendant in covenant do not plead *non est factum*, the execution of so much of the deed as is expanded on the record is admitted; but if the plaintiff wish to avail himself of any other part of the deed, he must prove it by the attesting witness in the usual way. *Williams v. Sills*, 2 Campb. 519. In an action by an executor or administrator on a cause of action arising in the lifetime of the testator or intestate, a plea of the general issue admits the title of the plaintiff to sue as executor or administrator. *Marsfield v. Marsh*, 2 Ld. Raym. 824.

* 10 Eng. Com. Law. Reps. 5. † 7 Id. 205. ‡ 1 Id. 86.

Thynne v. Protheroe, 2 M. and S. 553. But where the cause of action arises in the time of the executor or administrator, the general issue does not admit his title, and the plaintiff must prove it. Thus where the plaintiff declares in trover upon a possession by his testator, and a conversion in his own time, pleading the general issue does not admit his title as executor. *Hunt v. Stevens*, 3 Taunt. 113; but see *Watson v. King*, 4 Campb. 272. The plea of the general issue admits only such a title as is stated in the declaration, and therefore where profert is made of letters of administration which do not establish the plaintiff's claim to recover in the action, the plea of the general issue will not admit the title of the plaintiff so far as to enable him to recover.* *Adams v. Savage*, 6 Mod. 134. In an action by husband and wife, the plea of the general issue admits the marriage. *B. N. P.* 20. The plea of payment, in debt by assignees of a bankrupt upon a bond, admits their title as assignees. *Corsbie v. Oliver*, 1 Stark. 62.¹ Where, in trespass, the defendant pleads an entry to abate a nuisance and the plaintiff new assigns unnecessary violence, the nuisance is admitted and the plaintiff cannot go into evidence to negative it. *Pickering v. Rudd*, 1 Stark. 56.¹ 4 Campb. 219, S. C. A demurrer to a bill in equity does not admit the facts so as to be evidence against the defendant in another action between the same parties. *Tomkins v. Ashby*, 1 M. and M. 32.

Suffering a judgment by default is an admission on the record of the cause of action. Thus in an action against the acceptor of a bill, the defendant, by suffering judgment, admits a cause of action to the amount of the bill. *Green v. Hearne*, 3 T. R. 301. So in an action on a contract, the defendant cannot, after a judgment by default, insist upon the fraud of the plaintiff. *East India Company v. Glover*, 1 Str. 612. But where an action is removed by habeas corpus from an inferior court, after judgment by default, that judgment is not evidence against the defendant in the superior court. *Bottings v. Firby*, 9 B. and C. 762.² So a demurrer admits the facts; and on a writ of inquiry after judgment for the plaintiff, the amount of the damages is the only question. *De Guillon v. L'Aigle*, 1 B. and P. 368.

[*Whole admission to be taken together.*] The whole of an admission must be taken together, and therefore where an account rendered by the defendant is produced to establish the plaintiff's demand, it is evidence to prove both the debtor and creditor side of the account. *Randle v. Blackburn*, 5 Taunt. 245.¹ *Thomson v. Austen*, 2 D. and R. 361.² *Fletcher v. Froggatt*, 2 C. and P. 569.³ The assertion of a party in conversation, given in evidence against him, of facts in his favour, is evidence for him of those facts.

¹ 2 Eng. Com. Law Reps. 303. ² Id. 293. ³ 17 Id. 492. ¹ Id. 92.

² 16 Id. 94. ³ 12 Id. 267.

* In a suit by a corporation, a plea to the merits is an admission of the plaintiff's capacity to sue. *Conard v. Atlantic Ins. Co.* 1 Peters, 450.

Smith v. Blandy, R. and M. 257. But though the defendant is entitled to have the whole of the particular entry in a book read, yet he cannot insist upon reading distinct entries in different parts of the book. *Catt v. Howard*, 3 Stark. 6.* See also *Remmie v. Hall, Mann. Index.* 376. *Roe v. Ferrars*, 2 B. and P. 548.

Admissions compulsory.] An admission made in the course of an examination under compulsory process, as before commissioners of bankrupt, is evidence against the party making it. *Robson v. Alexander*, 1 B. and P. 448. *Smith v. Beadnell*, 1 Camp. 30. *Stockfleth v. De Tastet*, 4 Campb. 10. So upon compulsory process from the House of Commons. *R. v. Mercer*, 2 Stark. 366.* But if the party was imposed upon when he signed the examination, or was under duress, he will not be bound by it. *Per* *Ld. Ellenborough, Stockfleth v. De Tastet*, 4 Campb. 4; and see *Tucker v. Barrow*, 7 B. and C. 623,* 1 M. and R. 518. S. C.

OBJECT OF EVIDENCE.

THE object of evidence is to prove the point in issue between the parties, and, in doing this, there are three rules to be observed: 1. That the evidence be confined to the point in issue. 2. That the substance of the issue only need be proved; and, 3. That the affirmative of the issue is to be proved.

EVIDENCE CONFINED TO THE ISSUE.

Surplusage.] Where an averment may be wholly rejected as surplusage, it need not be proved, as the proof of it would not tend to the decision of the point in issue. The rule with regard to the proof of averments is, that if the whole of an averment may be struck out without injuring the plaintiff's right of action, it is not necessary to prove it; but it is otherwise, if the whole cannot be struck out without getting rid of a part essential to the cause of action; for there, though the averment be more particular than it need have been, the whole must be proved, or the plaintiff cannot recover. *Per* *Lawrence, J. Williamson v. Allison*, 2 East, 452. Thus, where the plaintiff, in an action on a warranty of goods, alleged that the defendants *knew* the goods to be unfit for sale, it was held, that the allegation of knowledge being immaterial, need not be proved. *Ibid.* But, where the plaintiff, in an action against the sheriff for taking a tenant's goods in execution without leaving

* 14 Eng. Com. Law Reps. 143. * 3 Id. 385. * 14 Id. 103.

a year's rent, stated the terms with more particularity than was necessary, it was held, that they must be proved as laid. *Bristow v. Wright*, Dougl. 640, 665.

Evidence of collateral facts, when admissible.] In general, evidence of collateral facts is not admissible. Thus where the question was as to the quality of beer to be furnished by the plaintiffs to the defendant, it was held that evidence could not be admitted of the quality of beer supplied by the plaintiff to other persons. *Holcombe v. Hewson*, 2 Campb. 391. But where a collateral fact is material to the proof of the issue joined between the parties, evidence of such fact is admissible. Thus, in order to prove that the acceptor of a bill knew the payee to be a fictitious person, or that the drawer had a general authority from him to fill up bills with the name of a fictitious payee, evidence may be adduced to show that he had accepted similar bills before they could, according to their date, have arrived from the place of date. *Hunter v. Gibson*, 2 H. Bl. 288. But, in an action against the acceptor of a bill who defends on the ground of forgery, evidence that the person suspected of the forgery, has forged the defendant's name in other instances, is inadmissible. *Balutti v. Serani*, Peake, 142. *Graft v. Lord Brownlow Bertie*, M. S. Peake Ev. 111. *Viney v. Barss*, 1 Esp. 293. Proof of a customary right in a particular manor or parish is no evidence as to the customary rights in an adjoining parish or manor; *Duke of Somerset v. France*, 1 Str. 661; but where all the manors in a particular district are held under the same tenure, and a question arises in one of the manors as to an incident to the tenure, evidence may be given of the usage prevailing in any other of the manors within the district. *Ibid.* *Champion v. Atkinson*, 3 Keb. 90, R. v. *Ellis*, 1 M. and S. 662. So where, in each of several manors belonging to the same lord, and part of the same district, it appeared that there was a class of tenants answering the same description, and to whom their tenements were granted by similar words, it was held that evidence of the rights enjoyed by those tenants in one manor might be received to show what were their rights in another. *Roe v. Brenton*, 8 B. and C. 758.* So proof of the manner in which a particular trade is carried on at one place is evidence as to the course of that particular trade in another place. *Noble v. Kennoway*, 2 Dougl. 510. Upon a question of skill and judgment evidence may be given of facts, which, although in other respects collateral, are, by means of the skill and judgment of the witness, connected with, and tend to elucidate the issue. *Folkes v. Chad*, 1 Phill. Ev. 276. 3 Dougl. 167, S. C. Where the question was as to the right to certain trees growing in a woody belt of considerable extent, entire and undivided, evidence was admitted of several acts of ownership in different parts of the belt;

* 15 Eng. Com. Law Reps. 335

Stanley v. White, 14 East, 322; but in trespass by the proprietors of a canal, it was held, that evidence of acts of ownership by the proprietors on other parts of the banks than those in question was not admissible to prove property, without shewing them to be part of one entire district, or that they had belonged to one person. *Hollis v. Goldfinch*, 1 B. and C. 205,* and see *Tyrwhit v. Wynn*, 2 B. and A. 554. In an action by a rector for tithes, where the question is, whether a modus exists of a certain sum of money for a particular farm in a township within the parish, and the ecclesiastical and parliamentary surveys are silent as to any township or farm modus, after proof by the defendant of a uniform payment in lieu of tithes, the plaintiff may inquire whether other farms in the same township are not subject to the same payment, for the purpose of showing that such payments cannot be a modus, consistently with the evidence previously adduced. *Blundell v. Howard*, 1 M. and S. 292. 1 Phill. Ev. 164.

Evidence of special damage.] Where the special damage sustained by the plaintiff is not stated in the declaration, it is not one of the points in issue, and evidence of it cannot be received. But a damage which is the necessary result of the defendant's breach of contract may be proved, although not alleged in the declaration. See *Ward v. Smith*, 11 Price, 19. Special damage must be stated with certainty. Thus, where in an action for an irregular distress, it was averred that the plaintiff, in consequence of the injury, had lost divers lodgers, without naming any, Lord Ellenborough rejected evidence of the damage, because the names of the lodgers were not specified. *Westwood v. Cowne*, 1 Stark. 172.† Where it was alleged as special damage that the plaintiff lost her marriage with J. N., Holt, C. J. refused to let evidence be given of a loss of marriage with any other person. *Martin v. Henrickson*, 2 Ld. Raym. 1007; and see post, "Case for defamation."

Evidence of character.] In general, evidence as to the character of either of the parties to a suit is inadmissible, it being foreign to the point in issue. Thus, in an action for slander, imputing dishonesty to the plaintiff, he cannot adduce evidence in the first instance of good character. *Cornwall v. Richardson, R. and M.* 305. So also it has been held, that the plaintiff in an action for crim. con. or seduction, cannot give evidence of the good character of the wife or daughter, until evidence has been offered on the other side to impeach it; *Barnfield v. Massey*, 1 Campb. 460; and, if such evidence be not general, but go only to a specific instance, it has been ruled, that the plaintiff cannot, in reply, give evidence of general character, but must be restricted to the disproving of the specific in-

* 8 Eng. Com. Law Reps. 62. † 2 Id. 342.

stance. *Ibid.* but see 2 *Phill.* 205, 2 *Stark. Ev.* 371. Where the cross examination of the plaintiff's witnesses has been directed to impeach the character of the plaintiff, and the witnesses deny the imputation intended, proof of the plaintiff's good character is not admissible. *King v. Francis*, 3 *Esp.* 116. See *Bate v. Hill*, 1 *C. and P.* 100.*

But evidence of the party's bad character is admitted in some actions, with a view to the amount of damages. Thus, in actions of crim. con. evidence is admissible of the wife's bad character for chastity, and even of particular acts of adultery committed by her before her intercourse with the defendant; for, by bringing the action, the husband puts her general behaviour in issue. *B. N. P.* 27, 296. So of the husband's profligacy, and of his criminal connexion with other women. *Ibid.* So in slander, it was formerly held, that where the defendant does not justify, evidence might be given of the plaintiff's bad character, as that at the time of the supposed offence, the plaintiff was generally suspected of the crime imputed to him; — *v. Moor*, 1 *M. and S.* 264, *Lord Leicester v. Walter*, 2 *Campb.* 251; but it has since been decided, that general evidence of the plaintiff's bad character is inadmissible in mitigation of damages. *Jones v. Stevens*, 11 *Price*, 235. See further as to the character of witnesses, *post*.

Particulars of plaintiff's demand.] Where the plaintiff has delivered a bill of the particulars of his demand, he will be precluded from giving any evidence of demands not contained in his particular. Thus, where the particular states a demand for horses sold by the plaintiff to the defendant, evidence cannot be given of money due from the defendant for horses sold by him as the plaintiff's agent. *Holland v. Hopkins*, 2 *B. and P.* 243. But in an action against an agent for not accounting for goods delivered to the plaintiff to be sold, and for goods sold, and money had and received, particulars headed "A. to B. — tierces of porter, &c. l. —" and containing also items for money had and received, were held to be applicable to any of the counts in the declaration. *Hunter v. Welch*, 1 *Stark.* 224.† So in an action by a carrier who had misdelivered certain goods to the defendant, which the latter appropriated to his own use, the carrier having paid the amount of the goods to the real owner, it was held that he might recover on the count for money paid, although his particulars were only "To seventeen firkins of butter, 55l. 6s." *Brown v. Hodgson*, 4 *Taunt.* 189. Where the particulars contain a demand on a promissory note only, which could not be given in evidence for want of a stamp, it was held, that the plaintiff could not give evidence of the consideration of the note. *Wade v. Beasley*, 4 *Esp.* 7. Where a particular need not be given as to some counts, the omission of those causes of ac-

* 11 *Eng. Com. Law Reps.* 329. † 2 *Id.* 365.

tion will not be material. Thus, where the first count was on a bill of exchange for 40*l.*, and the second on a bill for 20*l.*, and the third for goods sold, and the particulars specified only the 20*l.* bill and the goods, *per Abbott, C. J.* "That is no objection. If the bill is specified in the declaration, it need not be mentioned in the particulars. You must give a particular of goods sold, but you never need give a particular of bills of exchange, if they appear in the declaration." *Cooper v. Amos*, 2 C. and P. 267.* The plaintiff may recover interest, though the particular only contains a demand upon a promissory note. *Blake v. Lawrence*, 4 Esp. 147. In one case, it was ruled that the plaintiff might recover more than his particulars demanded, the defendant having given in evidence an account, from which it appeared that there was a sum of money due to the plaintiff beyond that claimed in his particulars. *Hurst v. Watkins*, 1 Campb. 68, and see 1 Phill. Ev. 182. So where the defendant pleaded in abatement, that the promises were made by himself and another person jointly, and it appeared from the particulars, and was admitted at the trial, that some of the articles were furnished to the defendant jointly with the person named in the plea, it was held by Lord Kenyon, that the plaintiff was bound by his particulars, and that he must be nonsuited, although it appeared by the particulars that part of the demand was due from the defendant alone. *Colson v. Selby*, 1 Esp. 451. But where, in an action for lottery-tickets sold, the particulars of the defendant's set-off mentioned the sale of the tickets to himself, it was held, that this was not sufficient proof of the sale, and that the fact must be proved by other evidence. *Miller v. Johnson*, 2 Esp. 602. *Harrington v. Macmorris*, 5 Taunt. 229.* Yet, in a very late case, the particulars of the plaintiff's demand were allowed to be read for the defendant, in order to prove payments for which the plaintiff had given the defendant credit. *Rymer v. Cook*, 1 M. and M. 86 (n). The plaintiff may give evidence of a demand contained in his particular, though he omitted to include it in a bill delivered before action brought. *Short v. Edwards*, 1 Esp. 374.

A mistake in the particulars, not calculated to mislead, is immaterial. Thus, where the particular specified a bill for 60*l.* bearing date on a certain day, and the evidence was of a bill for 63*l.* dated on a different day in the same year and month, Abbott J. held the variance to be immaterial. *Manning's Index*, 240. So where the particulars specify a payment made on account of the defendant to A., which was in fact made to B., it is sufficient, unless the defendant will state to the court by affidavit that he has been misled. *Day v. Bowyer*, 1 Campb. 69 (n). So where the action is for money had and received to the use of the bankrupt, and the particulars for money had and received to the use of the plaintiffs, as

* 12 Eng. Com. Law Reps. 124. * 1 Id. 88.

assignees. *Tucker v. Barrow*, 1 *M. and M.* 137. So also where work and labour is stated to have been performed in a certain month, which was in fact performed in another month, it is immaterial. *Milwood v. Walter*, 2 *Taunt.* 224. So again, where in debt for rent, premises situate at A. are described as situate at B., it is immaterial, unless the defendant can prove that he held other premises at B. of the plaintiff. *Davies v. Edwards*, 3 *M. and S.* 380. If the plaintiff, perceiving a defect in his particulars, delivers a second bill of particulars large enough to comprehend his whole demand, yet this will not avail him, unless the second particular has been delivered under a judge's order, and he will be confined to his first particular. *Brown v. Watts*, 1 *Taunt.* 353.

The particulars are proved by the production of the judge's order, and of the particulars themselves, and by proof of the signature of the party, or his attorney or agent. 1 *Phill. Ev.* 183.

Evidence confined to the issue—of what facts the courts will take judicial notice.] There are various facts which the courts notice judicially, and of which it is of course unnecessary to give any evidence. They will judicially notice the order and course of proceedings in Parliament; *Lake v. King*, 1 *Saund.* 131; the superior courts and their jurisdiction; *Tregany v. Fletcher*, 1 *Lord Raym.* 184; and course of proceeding; *Dobson v. Bell*, 2 *Lev.* 176; and the privileges of their officers; *Ogle v. Norcliffe*, 2 *Lord Raym.* 869; the beginning and end of term; *Estwicke v. Cooke*, 2 *Lord Raym.* 1557; 1 *Saund.* 300 d. (n). 5th ed.; general customs, as those of gavelkind and borough English; *Clements v. Scudamore*, 2 *Ld. Raym.* 1025; the limits of ecclesiastical jurisdictions; *Adams v. Terretenants of Savage*, 2 *Ld. Raym.* 854; the limits of counties; 2 *Inst.* 557. *Deybel's case*, 4 *B. and A.* 248; the days of festivals appointed by the calendar; *Brough v. Perkins*, 6 *Mod.* 81; and the number of days in a particular month. 1 *Rol. Ab.* 524.

The courts will not notice judicially the nature and jurisdiction of inferior courts; *Moravia v. Sloper*, *Willes*, 37; nor foreign laws; *Mostyn v. Fabrigas*, *Coup.* 174; nor the seal nor proceeding of a foreign court; *Henry v. Adey*, 3 *East*, 221; *Ganer v. Lady Lanesborough*. *Peake*, 17; nor the laws of the colonies; *Wey v. Yally*, 6 *Mod.* 194; nor the King's proclamation, without production of the *Gazette*; *Van Omeron v. Dowick*, 2 *Campb.* 44; nor particular customs, as those of London; *Argyle v. Hunt*, 1 *Str.* 187, *Wiseman v. Cotton*, 1 *Sid.* 138; nor that a particular town is within a certain diocese; *R. v. Simpson*, 2 *Ld. Raym.* 1379; nor the local situation of a town in a county; *Deybel's case*, 4 *B. and A.* 243; nor that a particular town, as Dublin, is in Ireland; *Kearney v. King*, 2 *B. and A.* 303; nor the sheriffs' book. *Russell v. Dickson*, 6 *Bingh.* 442.* Though the court will take judicial notice of the articles

* 6 *Eng. Com. Law Reps.* 413. * 19 *Id.* 125.

of war which are printed by the King's printer; *Bradley v. Arthur*, 4 B. and C. 304,* *R. v. Withers*, cited 5 T. R. 446; yet the book called "Rules and Regulations for the Government of the Army," will not be judicially noticed. *Bradley v. Arthur*, 4 B. and C. 304.*

THE SUBSTANCE OF THE ISSUE ONLY NEED BE PROVED.

The substance of the issue joined between the parties need alone be proved. 1 *Phill. Ev.* 190. Thus, on a count against a sheriff for a voluntary escape, the plaintiff may prove a negligent escape. *Bonafous v. Walker*, 2 T. R. 126. So on a count on a policy for a total loss, he may prove a partial loss. *Gardiner v. Croasdale*, 2 Burr. 904. So if a plea in trespass allege two matters, either of which amounts to a justification, proof of one of them is sufficient, though they are both put in issue by the replication. *Spilsbury v. Micklethwaite*, 1 Taunt. 146. In an action on a bond, the condition of which is, that the obligor will not cut down any trees, if the plaintiff assigns a breach, that the obligor cut down twenty trees, he may prove that part of that number only were cut down. *Co. Litt.* 262 (a). In slander, the plaintiff is entitled to a verdict on proof of some of the actionable words laid. *Compagnon v. Martin*, 2 W. Bl. 790. In replevin, the defendant, who avows for rent arrear, is entitled to a verdict, though he prove less to be in arrear than he has alleged. *Harrison v. Barnby*, 5 T. R. 248. When an averment is divisible, it is sufficient to prove one part of it. Thus, where in a declaration for a false return to a *fi. fa.* against the goods of A. and B. it was alleged, that A. and B. had goods within the Bailiwick, it was held sufficient to prove that either A. or B. had goods. *Jones v. Clayton*, 4 M. and S. 349.

The doctrine of variances in general depends upon the rule that the substance of the issue need only be proved.

Variance—amendment.] By a late act, the court has the power of ordering the record to be amended in case of variance. By 9 Geo. IV. c. 15, it is enacted, that it shall and may be lawful for every court of record holding pleas in civil actions, any judge sitting at Nisi Prius, and any court of oyer and terminer, and general jail delivery in England and Wales, the town of Berwick upon Tweed, and Ireland, if such court or judge shall see fit to do so, to cause the record on which any trial may be pending before any such judge or court, in any civil action, or in any indictment or information for any misdemeanor, when any variance shall appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof upon the record whereon the

* 10 Eng. Com. Law Reps. 340.

trial is pending, to be forthwith amended in such particular by some officer of the court, on payment of such costs, if any, to the other party, as such judge or court shall think reasonable, and thereupon the trial shall proceed as if no such variance had appeared; and in case such trial shall be had at Nisi Prius, the order for the amendment shall be indorsed on the postea and returned together with the record, and thereupon the papers, rolls, and other records of the court from which such record issued, shall be amended accordingly. *See Webb v. Hill*, 1 *M. and M.* 253, *stated post*. Where a judgment is stated in the record as of one court, and it appears by the production of an examined copy to have been obtained in another, the judge may order the record to be amended under the above statute. *Briant v. Kicke*, 1 *M. and M.* 359. Where in replevin the defendant avowed for rent arrear, and on production of the lease it varied from the terms of the tenancy stated in the avowry, Park J. refused to permit an amendment under this statute, observing, that it only applied to cases where some particular written instrument was professed to be set out or recited. *Ryder v. Malbon*, 3 *C. and P.* 594.¹ So where certain words had been added to an acceptance of a bill, obviously after the bill was accepted, and the declaration stated the acceptance with the addition of these words, Lord Tenterden refused an amendment, saying that it was not one of those cases where there had been a verbal mistake in setting out some written document. *Jelf v. Oriell*, 4 *C. and P.* 22,² and see *Rutherford v. Evans*, *Id.* 79.³ Where the declaration against the acceptor of a bill mis-stated the date of the bill, Parke J. allowed an amendment *without costs*. *Bentzing v. Scott*, *Id.* 24.

Variance in contract—in the parties.] It is a fatal variance, if it appear that a party who ought to be joined as plaintiff has been omitted; *Graham v. Robertson*, 2 *T. R.* 282; 1 *Saund.* 291, *h* (n); but it is no variance to omit a person who might have been joined as defendant; the non-joinder must be pleaded in abatement. *Evans v. Lewis*, 1 *Saund.* 291, *d* (n). Thus, where the declaration stated a bill of exchange to have been drawn upon, and accepted by the three defendants, and it was proved to have been drawn upon and accepted by them jointly, with a fourth, it was held no variance. *Mountstephen v. Brooke*, 1 *B. and A.* 224. Where a contract has been made with two persons, one of whom has since died, and the action is brought upon such contract by the survivor, without stating the fact of his being survivor, it is a fatal variance; *Jell v. Douglas*, 4 *B. and A.* 374;⁴ but it is otherwise with regard to the party against whom an action is brought, who need not be stated to be survivor, for the joint debt may, by reason of the death of the party, be treated as if it had been originally a separate debt. *Richards v. Heather*, 1 *B. and A.* 29. Where a con-

¹ 14 Eng. Com. Law Reps. 470. ² 19 *Id.* 257. ³ 19 *Id.* 281. ⁴ 19 *Id.* 257. 6 *Id.* 451.

tract is made by one of several partners (the partnership being really interested) it is no variance, that the action is brought in the name of all the partners; *Garrett v. Handley*, 4 B. and C. 664;² for the action may be maintained either in the name of the person with whom the contract was actually made, or in the name of the parties really interested. *Skinner v. Stocks*, 4 B. and A. 437.³ Thus, where an attorney carried on business under the firm of "A. and Son," the son not being in fact a partner, but acting as a clerk to his father, and receiving a salary, it was held that A. might maintain an action in his own name, to recover from a client the amount of a bill for business done. *Kelly v. Nainby*, 10 B. and C. 20. It is a fatal variance to describe a bond conditioned for payment by A. B. and C. as a bond for payment by A. B. and D., though the bond be several as well as joint, and the action be against A. severally. *Adams v. Bateson*, 6 Bingh. 110.⁴ The non-joinder of a secret partner cannot be pleaded in abatement. *Mullett v. Hook*, 1 M. and M. 88. See post "Assumpsit Defence."

Variance in contract—in consideration.] It is not necessary for the plaintiff to set out all the several parts of a contract consisting of distinct and collateral provisions, it is sufficient to state so much of the contract as contains the entire consideration for the act, and the entire act to be done in virtue of such consideration, including the time, manner, and other circumstances of its performance. *Clarke v. Gray*, 6 East, 568. *Parker v. Palmer*, 4 B. and A. 387.⁵ Thus, where the plaintiff declared, that in consideration of his redelivery to the defendant of an unsound horse, the defendant promised to deliver to him another horse, which should be worth 80*l.* and be a young horse, and a breach was assigned in both those respects, it was held no variance, though it was proved that the defendant also promised that the horse was *sound*, and had never been in harness. *Miles v. Sheward*, 8 East, 7. The omission of any part of the consideration is a fatal variance. Thus, in assumpsit by landlord against the assignee of a bankrupt, on an agreement to pay ten shillings in the pound for rent due from the bankrupt and themselves, it appeared that part of the consideration was, that the plaintiff should accept a surrender, which consideration being omitted, the plaintiff was nonsuited. *Dashwood v. Peart*, *Manning's Index*, 308. So where the contract declared on was, that the defendant should deliver to the plaintiff all his tallow at 4*s.* per stone, and the contract proved was, that the defendant should deliver it at 4*s.* per stone, and so much more as the plaintiff paid to any other person, the variance was held fatal. *Churchill v. Wilkins*, 1 T. R. 447. It seems, that if the declaration state the consideration to be certain reasonable reward, evidence that a spe-

² 10 Eng. Com. Law Reps. 463. ³ 6 Id. 478. ⁴ 19 Id. 21. ⁵ 6 Id. 456.

cific sum was agreed on will not be a material variance. *Semb. Per Chambre, J. Bayley v. Tricker, 2 N. R. 458, see post, p. 45.*

Variance in contract—in the promise.] It is only necessary to state so much of the promise, for the breach of which the plaintiff proceeds, *supra*. But the omission of a qualification in the promise will be fatal. Thus, the statement of a general warranty of a horse is not supported by proof of a warranty of soundness, *excepting a kick on the leg. Jones v. Cowley, 4 B. and C. 445.*¹ So when the plaintiffs declared, that for certain hire and reward the defendants undertook to carry goods from London, and deliver them safely at Dover, and the contract proved was to carry and deliver safely (fire and robbery excepted) the variance was held fatal. *Latham v. Rutley, 2 B. and C. 20.*² So a promise in the alternative cannot be stated as an absolute promise. *Penny v. Porter, 2 East, 2.* So any addition to the promise will be a fatal variance. Thus, a contract to deliver soil cannot be declared upon as a contract to deliver soil, or breeze, if it appear that soil and breeze are different articles. *Clark v. Manstone, 5 Esp. 239.* So the omission of any part of the entire promise, for the breach of which the plaintiff proceeds, will be fatal. Thus, where land was alleged to have been demised at a rent of 15*l.* and, in evidence the rent appeared to be 15*l.* and three fowls, the variance was held fatal. *Sands v. Ledger, 2 Ld. Raym. 792.* So where the allegation was, that the defendant promised to farm certain lands in a husbandlike manner, and the proof was that he promised to farm the land in a husbandlike manner, to be kept constantly in grass, the variance was held fatal. *Saunderson v. Griffiths, 5 B. and C. 909.*³ But, if the omission does not alter the legal effect of the promise, the variance is immaterial. Thus, where the promise was stated to be to deliver a quantity of gum Senegal, but the contract appeared by the evidence to be for the delivery of *rough* gum Senegal, the variance was held immaterial, it appearing that all gum Senegal on its arrival in this country is called rough. *Silver v. Heseltine, 1 Chitty 39.*⁴ So where the declaration stated that the defendant had agreed to buy a large quantity of head matter and sperm oil in the possession of the plaintiff, which was afterwards ascertained to be a given quantity, and the contract proved was, for the purchase of "all the head matter and sperm oil, *Per the Wildman,*" it was held no variance. *Wildman v. Glossop, 1 B. and A. 9.*

Variance in contract—in legal effect.] It is in general sufficient to describe a contract according to its legal effect. *See Thornton v. Jones, 2 Marsh. 287.*⁵ An agreement to sell oats at so much per bushel must be taken to mean the Winchester bushel, and will

¹ 10 Eng. Com. Law Reps. 377. ² 9 Id. 10. ³ 12 Id. 404. ⁴ 18 Id. 23.

⁵ 1 Id. 490.

not be supported by evidence to sell by some other bushel. *Hockin v. Cooke*, 4 T. R. 314. So if a bill of exchange is stated to have been drawn for a certain sum of money, it will be intended to be English money. *Kearney v. King*, 2 B. and A. 301. *Sproule v. Legge*, 1 B. and C. 16.^a But upon a common count for money lent, it is no variance if the loan is proved to have been of foreign coin, as pagodas. *Harrington v. Macmorris*, 5 Taunt. 228.^r It has been held that a statement of a contract to deliver saddles to the plaintiff at a reasonable price, is supported by proof of an agreement to deliver saddles "at 24s. a 26s." *Laing v. Fidgeon*, 6 Taunt. 108,^r and see *Bayley v. Tricker*, 2 N. R. 458, ante p. 44. But where the declaration was for not removing goods in a reasonable time, and the contract proved was to remove in a month, it was ruled by Lord Kenyon to be a fatal variance. *Hare v. Milner, Peake*, 42, a. So an averment of a contract to do an act on request, is not proved by a contract to do it on a certain day. *Bordenave v. Bartlett*, 5 East, 111. So the allegation of an agreement to take a full cargo of wheat is not supported by evidence of an agreement to take on board 500 quarters of wheat, though that quantity in fact amounts to a full cargo. *Harrison v. Wilson*, 2 Esp. 708. But see *Wickes v. Gordon*, infra. An allegation of a retainer "at a certain salary, to wit, 250*l.* per annum," can be supported only by proof of a contract for a specific annual salary. *Preston v. Butcher*, 1 Stark. 3.¹ The statement of a contract for the purchase of a certain quantity, to wit, eight tons of goods, is supported by proof of a contract for the purchase of *about* eight tons, the precise quantity having been ascertained to be eight tons. *Gladstone v. Neal*, 13 East, 418. The statement of a contract to deliver stock on the 27th of February, is proved by evidence of a contract to deliver on the settling day, coupled with proof that the settling day was fixed for, and understood by the parties to mean the 27th February. *Wickes v. Gordon*, 2 B. and A. 335. An averment, that a bill was drawn by certain persons using the style of "Ellis, Needham, and Co." is supported by proof, that the bill was drawn by A. only under the firm of Ellis, Needham, and Co. *Bass v. Clive*, 4 M. and S. 13. So a general averment, that a bill was accepted by the defendants, is proved by evidence, that it was accepted by their authorised agent for them. *Heys v. Heseltine*, 2 Campb. 604. And a conveyance to the defendant's nominee, supports an averment that the defendant became the purchaser. *Seaman v. Price*, R. and M. 195. A declaration on a joint bond is supported by proof of a joint and several bond. *Middleton v. Sandford*, 4 Campb. 34. In an action on a promissory note by A. B., if the plaintiff allege that the note was made payable to him by the name of A. C., and the note appears to have been made

^a 8 Eng. Com. Law Reps. 11. ¹ 1 Id. 38. ¹ 1 Id. 327. ² 1 Id. 268.

payable to A. C. the plaintiff is entitled to recover, if it be shown that he was the person really meant, for that is the legal effect. *Willis v. Barrett*, 2 Stark. 29.* Where two lots are sold under an enclosure act, a declaration upon a sale of "divers, to wit, two lots, &c." is bad, the agreements being separate both in law and fact, and not forming one contract. *James v. Shore*, 1 Stark. 428,† and see *Emmerson v. Heelis*, 2 Taunt. 47.

Variance in prescription.] Where a prescription is alleged in bar, it is an entire thing, and must be proved as laid. *Per Holroyd, J. Ricketts v. Salwey*, 2 B. and A. 366. The proof must be of a prescription as ample as that alleged, and therefore, on a prescription for all commonable cattle, evidence of common for sheep and horses only, will not maintain the issue. *Pring v. Henley*, B. N. P. 59. So where the defendant prescribed for all cattle, &c., at all times of the year, and it appeared in evidence that sheep were excepted for a certain time in the year, the court held the prescription not to be proved. *R. v. Hermitage*, 1 Carth. 241. But the proof of a larger prescription than that alleged will not be a variance. Thus, where the defendant prescribed for a right of common for 100 sheep, and the jury found a right for 100 sheep and six cows, the prescription was held to be proved. *Bushwood v. Pond*, Cro. Eliz. 722, and see *Bruges v. Searle*, Carth. 219. *Bailiffs of Tewksbury v. Bricknell*, 1 Taunt. 142, 1 Campb. 315 (n). In an action on the case for the disturbance of a prescriptive right of common, the plaintiff need not prove a right co-extensive with that stated in his declaration. *B. N. P.* 75. Thus, if the right be claimed in respect of a messuage and so many acres of land, proof that the common is in respect of the land only, will be sufficient to support the declaration. *Ricketts v. Salwey*, 2 B. and A. 360.

Variance in custom.] On a justification by the lord of a manor, that the lord should have the best beast on the tenant's death, the custom proved was, that the lord should have the best beast, or good, and the variance was held fatal. *Adderley v. Hart*, 1 B. and P. 394 (n). Where a plea of justification for taking two horses as heriots, stated a custom in the manor, that the lord, from time immemorial, until the division of a certain tenement into moieties, had taken, and been accustomed to take a heriot, upon the death of every tenant dying seised, and since the division the lord had taken, and been accustomed to take, on the death of every tenant dying seised of either of the moieties, a heriot for each moiety, it was held that this must be taken to be one entire custom, and not two distinct customs, the one applicable to the tenement before,

* 3 Eng. Com. Law Reps. 229. † 2 Id. 456.

and the other after the division of it, and that being alleged to be an immemorial custom, it was disproved by evidence that the division was made within memory. *Kingsmill v. Bull*, 9 East, 185.

Variance in torts.] The omission of a person who ought to be joined as a plaintiff in an action, *ex delicto*, is only ground of plea in abatement, and is no variance. *Dockrury v. Dickinson*, Skin. 640. *Bloxam v. Howard*, 5 East, 420. And the omission of a person who might have been joined as defendant cannot in any manner be taken advantage of; 1 Saund. 291, e (n); unless in case of one tenant in common of land sued in respect of the land, in which case he may plead the non-joinder of his cotenant in abatement. 1 Saund. 291, f (n). In actions of tort, it is no variance to prove a part only of the cause of action stated. Thus, in a count for slander, where the obnoxious words contain distinct charges, it is sufficient to prove the words conveying any one of those charges, provided the other words do not affect, or modify, those which are proved. *Flower v. Pedley*, 2 Esp. 491. So where the plaintiff declares for the disturbance of a right of common, which he has in respect of a messuage and land, he may prove a right of common in respect of the land only. *Ricketts v. Sawney*, 2 B. and A. 360, *supra*. But where in an action of tort, matter of contract is alleged, it must be proved as laid. *Bristow v. Wright*, Dougl. 640, *ante*, p. 36. So a matter of description must be proved as alleged; thus, in a declaration for assaulting a constable in the execution of his office, it was alleged that he was constable of a particular parish, but it appeared in evidence that he was sworn in for a liberty, of which the parish was part, and the variance was held fatal. *Goodes v. Wheatley*, 1 Campb. 231. The facts averred, or a part of them, sufficient to constitute a cause of action, must be proved as laid. Therefore, evidence that the defendant made a statement of facts amounting to a *tortious conversion*, will not support a count for imputing the crime of felony. *Tempest v. Chambers*, 1 Stark. 67.* So evidence of the improper stowing of the defendant's anchor, whereby it broke into another vessel and damaged the plaintiff's goods, will not support a count stating the injury to have been caused by the unskillful steering of the defendant's ship. *Hullman v. Bennett*, 5 Esp. 226. So where the declaration stated, that the defendant wrongfully placed and continued a heap of earth, whereby the refuse water was prevented from flowing away from his house down a ditch, at the back thereof, and it appeared in evidence, that the heap was not originally placed so as to obstruct the water, but that in process of time, earth from the heap was trodden down, and fell into the ditch and obstructed it, the variance was

* 2 Eng. Com. Law Reps. 298.

held fatal, for the injury was not the immediate act of the defendants, but consequential. *Fitzsimons v. Inglis*, 5 Taunt. 534.*

In actions of tort, as in other cases, it is sufficient to state matters according to their legal effect. Thus, in an action by the consignor of goods against the carrier, on a promise to carry them for a certain sum and reward to be paid by the plaintiffs, proof of an agreement between the consignor and consignee, that the latter shall pay the carriage, is no variance, the consignor being in law liable to the defendant. *Moore v. Wilson*, 1 T. R. 659. So in an action on the case for damage, occasioned by the defendant's negligence in driving his carriage, it is sufficient to show that the damage was occasioned by the negligence of his servant. *Brucker v. Fromont*, 6 T. R. 659.

Variance in records, writs, &c.] Where a record is stated by way of inducement, and is not the gist of the action, it is not necessary to describe it with a *prout patet*, &c. and it is sufficient to prove it substantially. Thus, in an action for a false return to a *fi. fa.*, where the declaration stated that the plaintiff in Trinity Term, 2 Geo. IV., recovered, &c., *prout patet per recordum*, and a judgment of Easter Term, 3 Geo. IV., was given in evidence, it was held no variance. *Stoddart v. Palmer*, 3 B. and C. 2.† *Phillips v. Shaw*, 4 B. and A. 435.* *Bennet v. Isaac*, 10 Price, 154. *R. v. Coppard*, 1 M. and M. 118. But where the judgment is the gist of the action it is otherwise. Thus in an action of debt on a judgment, if the declaration state the judgment to have been recovered in such a term, *prout patet*, &c., and it appears in evidence to have been recovered in another term, the variance is fatal. *Ras-tall v. Stratton*, 1 H. Bl. 49. In an action for a malicious prosecution, it was averred, that the defendant prosecuted an indictment against the plaintiff, until afterwards, to-wit, on a certain day, the plaintiff was in due manner acquitted; the record of acquittal was on another day, but the court held that the variance was immaterial, and that the averment was substantially proved. *Purcell v. Macnamara*, 9 East, 157. In an action for maliciously arresting and holding the plaintiff to bail, the declaration, in setting out the judgment by default, in the former action, stated, "that it was thereupon considered that the plaintiffs should take nothing by their said writ, but that they and their pledges to prosecute should be in mercy, &c.;" it was held to be no material variance that the record produced had not the words, "and their pledges to prosecute," but only an &c., for that those words might be rejected as surplusage, the substance of the allegation being the discontinuance of the former suit. *Judge v. Morgan*, 13 East, 547. An averment in an action for an escape, that bail

* 1 Eng. Com. Law Reps. 181. † 10 Id. 4. * 6 Id. 477.

above was put in before a judge at Chambers, "as appears by the record of the recognizance," is not supported by evidence of an examined copy of the entry of the recognizance of bail, stating the recognizance to have been taken *before the Court at Westminster*. *Bevan v. Jones*, 4 B. and C. 403.* In an action against the sheriff, on the stat. 8 Anne, c. 14, an averment that the *fi. fa.* issued out of the King's Bench is not proved by a *fi. fa.* issuing out of the Common Pleas. *Sheldon v. Whittaker*, 4 B. and C. 657.† Where in a declaration for an escape it was stated that a judgment was recovered in Easter Term, 5 Geo. IV., and that in Trinity Term in the same year there was an *award of execution* by the Court, and thereupon a commitment of the defendant to the custody of the marshal, it was held not to be necessary to prove the *sci. fa.* it being immaterial. *Bromfield v. Jones*, 4 B. and C. 380.‡ See also *Edwards v. Lucas*, 5 B. and C. 330.⁴ *R. v. Coppard*, 1 M. and M. 118.

Variance in deeds.] When a deed is stated in pleading, it must be proved as stated. Therefore, where a covenant is set out absolutely, without the qualifying context which belongs to it, this being an untrue statement of the deed in point of substance and effect, the variance will be fatal. *Hovel v. Richards*, 11 East, 641. Thus where the declaration stated a covenant to repair generally, and on *non est factum* pleaded, it appeared that the covenant contained an exception of "fire and all other casualties," Lord Ellenborough held the variance fatal. *Tempany v. Burnand*, 4 Campb. 20; and see *Swallow v. Beaumont*, 2 B. and A. 765. But when it is stated that by a certain deed, "it is witnessed," &c., there can be no variance, if the very words of the deed are set out. *Per Holroyd, J.*, *Ross v. Parker*, 1 B. and C. 362.⁵ And where a deed contains a proviso, in defeasance of a covenant, but not incorporated therewith, it is no variance to omit such proviso; *Gordon v. Gordon*, 1 Stark. 294;⁶ unless the proviso be referred to in the covenant, in which case, it will be taken to form part of it. *Vavasour v. Ormrod*, 6 B. and C. 430.⁷ A deed may be stated according to its legal effect. Thus, where a lease was stated in a declaration to be made by the plaintiff of the one part, and T. R. of the other part, but appeared in evidence to have been actually made by the plaintiff and his wife of the one part, and T. R. of the other part, it was held to be no variance. *Arnold v. Revault*, 1 B. and B. 443.⁸ If a plaintiff states the legal effect of a deed, the defendant has a right to see it on oyer, and if the meaning varies from that attributed to it in the declaration, in order to take advantage of that variance, he should plead *non est factum*, without setting out the deed; if it does not support the breach he should set it out and demur; if, however, he sets out the deed on oyer, and pleads *non*

* 10 Eng. Com. Law Reps. 369. † 10 Id. 435. • 10 Id. 362. † 11 Id. 250.

• 8 Id. 100. † 2 Id. 396. • 13 Id. 225. † 5 Id. 141.

est factum, the only question at the trial of that issue is, whether the deed, whereof the tenor is set out, was executed by the defendant or not, *Snell v. Snell*, 4 B. and C. 741.¹ Where a deed granted liberty to make levels, pits, and *soughs*, and the declaration stated it as a liberty to make levels, pits, and *sloughs*, it was held, that under the rule *noscitur a sociis*, the court could discover this to be the word *soughs* mis-spelt, and that the variance was not fatal. *Morgan v. Edwards*, 6 Taunt. 394.* So where the plaintiff declared that by indenture he demised to the defendants "certain lands and premises," and the demise appeared to be of "all that piece, or parcel of ground, and premises, containing by estimation one acre," the variance was held to be immaterial. *Birch v. Gibbs*, 6 M. and S. 115. But the words "Cellar beer field," for "aller beer field," were held a fatal variance in setting out a covenant, though the plaintiffs waived the damages on the breach of that covenant. *Pitt v. Green*, 9 East, 188. So "storhouses" for "storehouse." *Hoar v. Mill*, 4 M. and S. 470. If a man is described as *James C.* in one part of a deed, and afterwards as *George C.*, and signs it *George C.*, he is properly declared against as *George C.* *Mayelstone v. Ld. Palmerston*, 1 M. and M. 6.

Variance in time.] Where the time is material, or where it is alleged by way of description, it must be proved as laid. Thus in debt to recover penalties for usury, the day on which the money was lent is material, though laid under a *videlicet*, and a variance from that day is fatal. *Partridge v. Coates, R. and M.* 153. So where a writ was described in terms, and on the production of the writ it appeared to be returnable on a different day from that stated, the variance was held to be fatal, though the day was laid under a *videlicet*. *Grey v. Rennet*, 1 T. R. 656; see also *Rastall v. Stratton*, 1 H. Bl. 49, *ante*, p. 48. So where the declaration alleged that the defendant, on such a day, made his certain bill of exchange, "bearing date the day and year aforesaid," and the real date of the bill was different, this being a variance in matter of description was held fatal. *Anon.* 2 Campb. 308 (n).

But where the time is neither material nor matter of description, a variance from it will not be fatal. Thus, where the declaration stated, that the defendant made his certain bill of exchange on such a day, but not that it bore date on that day, a variance from that day was held to be immaterial. *Coxon v. Lyon*, 2 Campb. 307 (n). So where the declaration alleged that a bill drawn on the 18th August, and payable 60 days after sight, was "afterwards, to wit, on the day and year aforesaid," accepted by the defendant, and the bill appeared to be accepted on the 19th September, Lord Ellenborough held the variance immaterial. *Freeman v. Jacob*, 4 Campb. 209. So where a bill was stated in the declaration to have been indorsed *before* it became due, and appeared in evidence to have

¹ 10 Eng. Com. Law Reps. 453. * 1 Id. 423.

been indorsed *after* it became due, the variance was held immaterial. *Young v. Wright*, 1 Campb. 139; *see also Purcell v. Macnamara*, 9 East, 157, *ante*, p. 48. So in trespass the day is immaterial; but in trespass with a *continuando*, or with a "divers days and times," though the plaintiff may prove any number of trespasses within the time laid, yet he can only prove a single act of trespass before the first day. *B. N. P.* 86, 1 *Saund.* 24 (n).

Variance in place.] Whenever a place is mentioned by way of description, and not merely as venue, a variance will be fatal, even though the local situation need not have been mentioned. *Guest v. Caumont*, 3 Campb. 235. Where the action is not local, the description of the place may be referred to venue, and a variance will not be material. Thus, in an action for negligence, an allegation that the plaintiff's boat was run down in the Thames *near* the Half-way-reach, is supported by proof that the boat was run down in the Half-way-reach. *Drewry v. Twiss*, 4 T. R. 558. So in an action on the case, for setting up a certain mark in front of the plaintiff's dwelling-house, in order to defame him as the keeper of a bawdy-house, if the declaration, after describing the house as situate in a certain street called A. street, in the parish of O. A. (there being no such parish), afterwards state the nuisance to be erected and placed in the parish *aforesaid*, it will be ascribed to venue, and need not be proved as laid. *Jeffries v. Duncombe*, 11 East, 226; and *see Mersey Navigation v. Douglas*, 2 East, 497. *Hamer v. Raymond*, 1 Marsh. 363.¹ But in an action on the case for a nuisance in erecting a weir, if it be described in the declaration to be at H., and be proved to be at a lower part of the same water, called T., the variance is fatal. *Shaw v. Wrigley*, cited 2 East, 500. Where the allegation of place is descriptive of a contract, it must be proved as laid. Thus in an action against a carrier a misdescription of the *termini* in the contract of carriage is fatal. *Tucker v. Cracklin*, 2 Stark. 385.² *See Woodward v. Booth*, 7 B. and C. 301; and further as to the proof of local descriptions, *post*, in "*Assumpsit for use and occupation*," "*Case against Carriers*," "*Ejectment*," and "*Trespass quare clausum fregit*."

AFFIRMATIVE OF THE ISSUE TO BE PROVED.

The general rule with regard to the onus of proving the issue is, that the party who asserts the affirmative is bound to prove the issue. Thus in an action for a loss occasioned by the barratry of the master of a vessel, it is not incumbent on the plaintiff, after proving the barratrous act, to prove also that the master was *not* the owner, or freighter, for that would be calling on him to prove a negative; the proof of that fact, which operates in discharge of

¹ 1 Eng. Com. Law Reps. 266. ² 3 Id. 394. ³ 14 Id. 48.

the other party, lies upon him. *Ross v. Hunter*, 4 T. R. 83. So where in action on an agreement to pay 100*l.* if the plaintiff would not send herrings to the London market, and particularly to the house of J. S., the plaintiff proved that he had sent no herrings during the twelvemonth to that house, it was held sufficient to entitle him to recover, no proof being given by the defendant that the plaintiff had sent herrings within the year to the London market. *Calder v. Rutherford*, 3 B. and B. 302. 7 B. Moore, 158, S. C. There are, however, some exceptions to this rule.

Where the presumption of law is in favour of the affirmative.] Where the presumption of law is in favour of the affirmative, as where the issue involves a charge of a culpable omission, it is incumbent on the party making the charge to prove it, although he must prove a negative, for the other party shall be presumed innocent until proved to be guilty. Thus, where in a suit for tithes in the spiritual court, the defendant pleaded that the plaintiff had not read the Thirty-nine Articles, it was held that the proof of the issue lay on the defendant. *Monke v. Butler*, 1 Roll. Rep. 83. 3 East, 199. *R. v. Hawkins*, 10 East, 216. So in an action by the owner of a ship for putting combustibles on board, "without giving due notice thereof," it was held that the plaintiff was bound to prove the want of notice. *Williams v. E. I. Comp.* 3 East, 193; and see *Marsh v. Horne*, 5 B. and C. 327, *post*. So where the issue is as to the legitimacy of a child born in lawful wedlock, *Banbury Peerage case*, 2 Selw. N. P. 709, it is incumbent on the party asserting the illegitimacy to prove it; and where the issue is on the life of a person who is proved to have been alive within seven years; *ante p. 18*; the party asserting his death must prove it.

Where the fact is peculiarly within the knowledge of a party.] But where the affirmative is peculiarly within the knowledge of the party charged, the presumption of the law in favour of innocence is not allowed to operate in the manner just mentioned, but the general rule as above stated applies, viz. that he who asserts the affirmative is to prove it, and not he who avers the negative. 2 *Russ. on Crimes*, 692, 2d Ed. Thus in an action on the game laws, though the plaintiff must aver that the defendant was not duly qualified, yet he cannot be called upon to prove the want of qualification. *Spieries v. Parker*, 1 T. R. 144, *Adm. R. v. Stone*, 1 East, 650. So in an action against a person for practising as an apothecary, without having obtained a certificate according to 55 Geo. III. c. 194, the proof of the certificate lies upon the defendant, and the plaintiff need offer no evidence of his practising without it. *Apoth. Comp. v. Bentley, R. and M.* 159.

INSTRUMENTS OF EVIDENCE.

Under the present head will be considered the mode in which the various kinds of documentary evidence must be proved, and also the rules with regard to the competency of witnesses, and their examination.

Proof of Acts of Parliament and Journals.

Acts of parliament are either public or private. The printed statute-book is evidence of a public statute, not as an authentic copy of the record itself, but as hints of that which is supposed to be lodged in every man's mind already. *Gilb. Ev.* 10. A private act of parliament is usually proved by a copy examined with the parliament roll. *B. N. P.* 225. A private act of parliament, containing a clause "that it shall be deemed and taken to be a public act, and shall be judicially taken notice of without being specially pleaded," requires to be proved in the usual manner by an examined copy. *Brett v. Beales*, 1 *M. and M.* 421. By stat. 41 Geo. III. c. 90, s. 9, the copy of the statutes of England, and of Great Britain since the union with Scotland, printed by the king's printer, shall be received as conclusive evidence of the statutes enacted prior to the union of Great Britain and Ireland, in any court of civil or criminal jurisdiction in Ireland; and in like manner the copy of the statutes of the kingdom of Ireland, made by the parliament of the same, printed by the king's printer, shall be received as conclusive evidence of the statutes enacted by the parliament of Ireland prior to the union of Great Britain and Ireland, in any court of civil or criminal jurisdiction in Great Britain.

The journals of the House of Lords, and of the House of Commons, may be proved by examined copies, but the printed journals are not evidence. *Lord Melville's case*, 24 *How. St. Tr.* 683. *R. v. Lord G. Gordon*, 2 *Dougl.* 593. An unstamped copy of the minutes of the reversal of a judgment in the House of Lords, without more of the proceedings, is evidence of the reversal. *Jones v. Randall*, *Corp.* 17.

Proof of Records.

[*Upon an issue of nul tiel, &c.*] Upon an issue of *nul tiel record*, the record, if a record of the same court, is produced, and inspected by the court, *Tidd*, 801; if a record of an inferior court, it is proved by the tenor of the record, certified under a writ of *certiorari*, issued by the superior court, *id.* 804; if a record of a concurrent superior court, it is proved by the tenor certified under a writ of *certiorari*, issued out of Chancery, and transmitted thence by writ of *mittimus*. *Ibid.*

Where *nul tiel record* is not pleaded, but it is necessary to prove a record in support of some allegation in the pleadings, the record may be proved either by an exemplification or a copy. Exemplifications are of two kinds, either under the great seal, or under the seal of the court in which the record is preserved. An exemplification under the great seal may be obtained of any record of the Court of Chancery, or of any record which has been removed thither by *certiorari*, but private deeds exemplified under the broad seal, will not be admitted in evidence. *B. N. P.* 227. Exemplifications of the records of a public court under its own seal, are admissible, without proof of the genuineness of the seal. *Tooker v. Duke of Beaufort, Sayer*, 297. But the genuineness of the seal of a foreign court must be proved; *Henry v. Adey*, 3 *East*, 221; and, if a foreign court has an official seal, it must be used for the purpose of authenticating its judgments, and a copy by an officer of the court is not sufficient. *Black v. Lord Braybrooke*, 2 *Stark.* 7;¹ and see *Appleton v. Lord Braybrooke*, 6 *M. and S.* 34. If a colonial court possess a seal, it should be used to authenticate its judgments, though so much worn as no longer to make any impression. *Cavan v. Stewart*, 1 *Stark.* 525.² If there be no seal of the court or island, an examined copy must be obtained; per *Lord Ellenborough, Appleton v. Lord Braybrooke*, 6 *M. and S.* 36; or distinct evidence should be given that the court has no seal, and verifies its judgments by the signature of the judge. *Alves v. Bunbury*, 4 *Campb.* 28. So the seal of a corporation must be proved to be genuine by a witness acquainted with it. *Moiss v. Thornton*, 8 *T. R.* 307; but it is not necessary to call a witness who saw the seal affixed. *Ibid.* The seal of the corporation of London has been held to prove itself. *Doe v. Mason*, 1 *Esp.* 53.

Examined copy of a record.] When the record is complete, an examined copy will be evidence, unless upon the issue of *nul tiel record*. Records are not complete until delivered into court in parchment, therefore a minute-book, from which an entry of the proceedings at sessions is made, and from which book the roll containing the record of such proceedings is subsequently made up, is not a record. *R. v. Bellamy, R. and M.* 171. So the judgment in paper, signed by the Master, is not evidence, for it is not yet become permanent; *B. N. P.* 228. *Godefroy v. Jay*, 1 *M. and M.* 236; 3 *C. and P.* 192, *S. C.*; nor the minute-book of the clerk of the peace to prove that an indictment was preferred. *R. v. Smith, B. and C.* 341.³ The copy of a record must be proved by a witness who has examined it line for line with the original, or who has examined the copy while another person read the original. *Rcid v. Margison*, 1 *Campb.* 469. And it is not necessary

¹ 3 *Eng. Com. Law Reps.* 218. ² 2 *Id.* 496. ³ 14 *Id.* 265. ⁴ 15 *Id.* 232.

for the persons examining to exchange papers, and read them alternately. *Gyles v. Hill, Id. (n). Rolf v. Dart*, 2 Taunt. 470. It ought to appear that the record from which the copy was taken was seen in the hands of the proper officer, or in the proper place for the custody of such records. *Adamthwayte v. Syngé*, 1 Stark. 183.* 4 Campb. 372, S. C. Where an ancient record has been lost, an old copy has been allowed to be given in evidence without proof of its being a true copy. *Anon.* 1 Vent. 257. *B. N. P.* 228.

Office copies.] An office copy in the same court, and in the same cause, is equivalent to a record; but in another court, or in another cause in the same court, the copy must be proved. *Per Lord Mansfield, Denn v. Fulford*, 2 Burr. 1179. But the office copy of an affidavit made in another cause in the same court has been admitted as good evidence. *Wightwick v. Banks, Forrest*, 153. An office copy of depositions in Chancery is evidence in that court, but will not be admitted in a court of common law without examination with the roll. *B. N. P.* 129. *Burnand v. Nerot*, 1 C. and P. 578. *Highfield v. Peake*, 1 M. and M. 109. By 7 Geo. IV. c. 57, s. 74, office copies of proceedings in the Insolvent Court are made evidence. *Vide post.*

Copies made by authorized officers.] Where a copy is made by a person trusted for that purpose, it is admissible in evidence without proof of its having been actually examined. *B. N. P.* 229. Thus, the chirograph of a fine is evidence of the fine, the chirographer being appointed to make that copy, but it is not evidence of the proclamations, for of them the chirographer is not appointed to make a copy. *Ibid. Gilb. Ev.* 23. So the indorsement by the proper officer on a deed of bargain and sale enrolled according to stat. 27 Hen. VIII. c. 16, is evidence of the enrolment; *Ibid. Kinnersley v. Orpe*, 1 Dougl. 56; and the date of enrolment indorsed by the clerk of the enrolments is conclusive evidence of the date. *R. v. Hopper*, 3 Price, 495. So a copy of the depositions of a witness taken at a judge's chambers, signed by the judge, and delivered out by his clerk, is admissible, without proof of examination with the original. *Duncan v. Scott*, 1. Campb. 101. A copy of a judgment, purporting to have been examined by the clerk of the treasury (who is not intrusted to make copies), is not admissible without proof of its examination with the original. *B. N. P.* 229.

To prove the time of signing a judgment, the day-book kept at the judgment-office is not evidence. *Lee v. Meecock*, 5 Esp. 177. *Ayrey v. Davenport*, 2 N. R. 474.

* 2 Eng. Com Law Reps. 348. † 11 Id. 479.

*Proof of Verdict.**Proof of Verdict.*

In order to prove a verdict, when it is offered as the opinion of the jury on the issue, the *postea* alone is not sufficient, but the judgment must also be proved to show that it has not been arrested, or a new trial granted; *Pitton v. Walter*, 1 Str. 162. *B. N. P.* 234; unless in case of an issue out of Chancery, when no judgment is entered up. *B. N. P.* 234. So the *Nisi Prius* record, with the *postea* indorsed, or with a minute of the verdict indorsed by the officer of the court on the jury panel, is sufficient evidence, that the cause came on to be tried. *Pitton v. Walter*, 1 Str. 162. *R. v. Browne*, 1 M. and M. 315. And in an action for a moiety of the money paid by the plaintiff under a verdict recovered by A., in a suit against the plaintiff and defendant, the *Nisi Prius* record and *postea* have been held to be evidence of the verdict and damages in the former suit without proof of the judgment. *Foster v. Comp-ton*, 2 Stark. 365.* So it was held by Lord Kenyon, that the production of the *postea* in a former cause between the same parties, would support a plea of set-off to the extent of the verdict. *Garland v. Scoones*, 2 Esp. 648. But see *Pitton v. Walter*, 1 Str. 162.

Proof of Writ.

Where a writ is the gist of the action, it must be proved by a copy of the record after its return; but where it is only inducement to the action, it may be proved by production of the writ itself, if it has not been returned. *B. N. P.* 234. A copy of the judgment-roll, containing an award of an elegit, and the return of the inquisition, is evidence of the elegit and inquisition, in an action for use and occupation. *Ramsbottom v. Buckhurst*, 2 M. and S. 565. As to secondary evidence of a writ, see *Edmonstone v. Plaisted*, 4 Esp. 160, ante, p. 5.

Proof of Inquisitions.

Where the return to an inquisition is given in evidence, it is in general necessary to show, that the inquiry has been made under proper authority. Thus, in the case of an inquisition *post mortem*, and such private offices, the return cannot be read without also reading the commission, unless, as it seems, the inquisition be old; *Vin. Ab. Ev.* (A. b. 42); but in cases of more general concern, such as the return to the commission in Henry the Eighth's time, to inquire of the value of livings, the commission is a thing of such general notoriety that it requires no proof. *B. N. P.* 228. So an ancient extent of crown lands found in the proper office, and purporting to have been taken by a steward of the king's lands, and following in its constructions the directions of the statute 4 Edw. I.,

* 3 Eng. Com. Law Reps. 384.

will be presumed to have been taken under competent authority, though the commission cannot be found. *Rowe v. Brentan*, 8 B. and C. 747.

Proof of Rule of Court.

A rule of court produced under the hand of the proper officer, need not be proved to be a true copy. *Selby v. Harris*, 1 Ld. Raym. 745. *Duncan v. Scott*, 1 Campb. 102. Where a Court prints and circulates copies of its rules for the guidance of its officers, one of such copies is evidence of the rules which the officers are to act on, without showing it examined with the original. *Dance v. Robson*, 1 M. and M. 294. A rule of court is not matter of record. *R. v. Bingham*, 3 Y. and J. 101.

Proof of Proceedings in Chancery.

A decree in Chancery may be proved by an exemplification, or by a sworn copy, or by a decretal order in paper, with proof of the bill and answer. *Trowel v. Castle*, 1 Keb. 21. B. N. P. 244. And it has been held, that the bill and answer need not be proved if they are recited in the decretal order. *Ibid. Com. Dig. Ev. (C. 1.)* However, the rule generally laid down seems to be, that where a party intends to avail himself of the contents of a decree, and not merely to prove an extrinsic collateral fact, (as that a decree was made by the court,) he ought regularly to give in evidence the proceedings on which the decree is founded. 1 *Phill. Ev.* 373. And see *Peake, Ev.* 74.

An answer in Chancery is proved by the production of the bill and answer, or of examined copies of them; but on proof by the proper officer, that the bill has been searched for in the office and not found, the answer may be read without the bill. *Gilb. Ev.* 55. Some proof of the identity of the parties is requisite; it may be proved by a witness who has seen the handwriting of the defendant to the original answer, though it is not produced in court. *Dartnall v. Howard*, R. and M. 169. So if the name and description of the defendant at law agree with the name and description of the party answering in equity, it is *prima facie* evidence of identity. *Hennell v. Lyon*, 1 B. and A. 182.

An answer offered in evidence merely as an admission of the party on oath, is sufficiently proved by an examined copy, without proof of a decree, or of the party's handwriting. *Lady Dartmouth v. Roberts*, 16 East, 334. So where a witness at a trial at law gave evidence at variance with what he had previously sworn in an answer in Chancery, it was held, that an examined copy of that answer was admissible to contradict him. *Ewer v. Ambrose*, 4 B. and C. 25. And see *Highfield v. Peake*, 1 M. and M. 109, *infra*.

An examined copy of an affidavit filed in the court of Chancery, is, as it seems, evidence without proof of the handwriting of the party making it, provided it be shown that it has been used or acted upon by him, but in case of an indictment for perjury, the handwriting must be proved. *R. v. James*, 1 *Show.* 397. *Crook v. Dowling*, 3 *Dougl.* *Casburn v. Reid*, 2 *B. Moore*, 60. *Rees v. Bowen*, *McCl. and Y.* 383.

Proof of Depositions.

What a witness, since dead, has sworn on a trial between the same parties, may be given in evidence either from the judge's notes, or from notes that have been taken by any other person, who will swear to their accuracy, or it may be proved, by any person who will swear from his memory to its having been given. *Per Mansfield, C. J., Mayor of Doncaster v. Day*, 3 *Taunt.* 262. *Strutt v. Bovingdon*, 5 *Esp.* 57. The witness must be prepared to prove the very words of the former witness. *Ennis v. Donisthorpe*, 1 *Phill. Ev.* 219, 6th ed. 4 *T. R.* 290.

Depositions in a suit in Chancery are not, in general, admissible without proof of the bill and answer; *B. N. P.* 240. *Gilb. Ev.* 62; unless so ancient that no bill or answer can be found; *Gilb. Ev.* 64. *Bryan v. Booth*, 2 *Price* 234 (n); or unless the depositions are offered in evidence as an admission merely, or for the purpose of contradicting a witness. 1 *Phill. Ev.* 375. In general depositions before an answer put in, are not admitted to be read; *B. N. P.* 240; but if the defendant in equity is in contempt, or has neglected to take advantage of an opportunity to cross-examine, the depositions may be read on proof of the bill without the answer. *Cazenove v. Vaughan*, 1 *M. and S.* 4.

Depositions offered in evidence, under an order of the court of Chancery, on directing a trial at law, may be read without proof of the bill and answer, it being proved, that at the time of trial the witnesses are unable to attend in person. *Palmer v. Aylesbury*, 15 *Ves.* 76. And on an issue out of Chancery, an examined copy of the depositions of one of the witnesses was allowed to be read for the purpose of contradicting the evidence of the same witness on the trial of the issue. *Highfield v. Peake*. 1 *M. and M.* 109.

Depositions taken on interrogatories under a commission, are not evidence without production of the commission, unless the depositions are of long standing. *Bayley v. Wyllie*, 6 *Esp.* 85. *Rowe v. Brenton*, 8 *B. and C.* 765. It must also be proved, that the witness is dead, insane, or absent. *Benson v. Olive*, 2 *Str.* 920. *Falconer v. Hanson*, 1 *Campb.* 172. But where the witness had actually sailed on a voyage, the depositions were allowed to be read, though the vessel was, at the time of trial, driven back into

* 4 Eng. Com. Law Reps. 405. † 15 Id. 335.

port by contrary winds. *Fonsick v. Agar*, 6 *Esp.* 92. But it is not sufficient that the witness is a seafaring man, and that he lately belonged to a vessel lying at a certain place, without proving that some effort has been recently made to procure his attendance. *Falconer v. Hanson*, 1 *Campb.* 172.

As to depositions in India, see stat. 33 Geo. III. c. 63, s. 40, 44.

Proof of Judgment of Inferior Court.

The judgment of a county court, court baron, or other inferior jurisdiction, may be proved by production of the book containing the proceedings of the court from the proper custody, and if not made up in form, the minutes of the proceedings will be evidence, or an examined copy of such proceedings or minutes will be sufficient. *R. v. Hains*, per *Holt*. C. J. *Comb.* 337. 12 *Vin.* (A. b. 26,) *Hennell v. Lyon*, 1 *B. and A.* 185. Thus the minute-book of the Consistorial Court is evidence of a decree for alimony. *Houlliston v. Smith*, 2 *C. and P.* 25.* But this rule does not extend to the court of quarter sessions. *R. v. Smith*, 8 *B. and C.* 341,⁴ ante p. 54. It seems, that in proving the judgment of an inferior court, evidence should also be given of the proceedings previous to judgment. *Com. Dig. Ev.* (C. 1). *Fisher v. Lane*, 2 *W. Bl.* 836. The book containing the original minutes will be sufficient evidence of these proceedings. *Chandler v. Roberts, Peake, Ev.* 80.

Proof of Court Rolls.

In order to prove the title of a copyholder, the court rolls may be produced; or copies of them properly stamped may be given in evidence, *Doe v. Hale*, 16 *East*, 208, the handwriting of the steward being proved; but where an admittance is more than thirty years old, proof of the signature of the steward is unnecessary. *Dean and Chapter of Ely v. Stewart*, 2 *Ath.* 45. But see *Duke of Somerset v. France, Fortescue*, 43. In one case, *Holt*, C. J. ruled that the rough draft of the steward of the manor was good evidence. *Anon.* 1 *Ld. Raym.* 735. 6 *B. and C.* 495.* And it has been held, that a surrender and presentment may be proved by a draft of an entry produced from the muniments of the manor, and the parol testimony of the foreman of the homage jury who made such presentment. *Doe v. Calloway*, 6 *B. and C.* 484.[†]

Proof of Probate.

Where the title to personal property, under a will, is in question, the original will cannot be read in evidence without some indorsement upon it for the purpose of authentication; but the pro-

* 12 *Eng. Com. Law. Reps.* 9. ⁴ 15 *Id.* 232. • 13 *Id.* 238. [†] 13 *Id.* 238.

bate must be produced. *R. v. Barnes*, 1 Stark. 243.^a *Penney v. Penney*, 8 B. and C. 335.^b The seal of the Ecclesiastical Court on the probate proves itself. *Kepton v. Cross*, Rep. temp. Hardw. 108. If the probate be lost, it is not the practice of an Ecclesiastical Court to grant a second probate, but only an exemplification, which will be evidence of the proving of the will. *Shepherd v. Shorthose*, 1 Str. 412. To prove the probate revoked, an entry of of the revocation in the book of the Prerogative Court is good evidence. *Ramsbottom's case*, 1 Leach, C. C. 30 (n), 3d ed.

Proof of Letters of Administration.

Administration is proved by the production of the letters of administration, or of a certificate or exemplification thereof, granted by the Ecclesiastical Court; *Kempton v. Cross*. Rep. t. Hardw. 108. B. N. P. 246; or without producing the letters of administration, by the original book of acts, directing the grant of the letters; *Ibid. Elden v. Keddel*, 8 East. 187; and an examined copy of the act book, stating the grant of letters of administration to the defendant, is proof of his being administrator, without notice to produce the letters. *Davis v. Williams*, 13 East, 232.

Proof of Foreign Laws.

The written law of a foreign state must be proved by a copy duly authenticated. *Clegg v. Levy*, 3 Campb. 166. Thus, when to prove the law of France as to marriage, the French vice-consul produced a book, which he said contained the code of laws upon which he acted at his office; that it was printed at the office for the printing of the laws of France; and that it would have been acted upon in any of the French courts; it was ruled by Abbott, C. J. to be sufficient proof of the law. *Lacon v. Higgins*, 3 Stark. 178;^c and see *R. v. Picton*, 30 How. St. Tr. 514, 494. The unwritten law of a foreign state may be proved by the parol evidence of witnesses possessing professional skill. *Per Gibbs*, C. J. *Miller v. Henrick*, 4 Campb. 155; but see *Boehlinck v. Schneider*, 3 Esp. 58. A collection of treaties published by the direction of the American government, will not be sufficient to prove a treaty; a copy examined with the archives should be produced. *Richardson v. Anderson* 1 Campb. 65 (n). An instrument purporting to be a divorce, under the seal of the synagogue at Leghorn, is not admissible without previous proof of the law of the country; *Ganer v. Lady Lanesborough*, Peake, 17; but Lord Kenyon permitted the party divorced to give parol evidence of her divorce at Leghorn, according to the ceremony and custom of the Jews there. *Ibid.*

^a 2 Eng. Com. Law Reps. 374. ^b 15 Id. 230. ^c 14 Id. 176.

Proof of Entries in Public Books, &c.

Whenever an original is of a public nature and admissible in evidence, an examined copy is also admissible. *Lynch v. Clarke*, 3 Salk. 154. Thus examined copies of the entries in the council book, or of a license preserved in the secretary of state's office; *Eyre v. Palgrave*, 2 Campb. 606; of entries in the bank books; *Marsh v. Colnett*, 2 Esp. 665; of a bank note filed at the bank; *Man v. Cary*, 3 Salk. 155; of entries in the books of the East India Company; *Dougl.* 593 (n); or in the books of the commissioners of land-tax; *R. v. King*, 2 T. R. 234; or of excise; *Fuller v. Fotch*, Carth. 346; or of a poll-book at an election; *Mead v. Robinson*, Willes, 424; or of a book kept in the chapter house of a dean and chapter, purporting to contain copies of leases; *Coombs v. Coether*, 1 M. and M. 398; are good evidence; and in one case, a copy of an agreement contained in one of the books of the Bodleian library (which cannot be removed) was allowed to be read in evidence. *Downes v. Moreman*, 2 Gwill. 659. An examined copy of a parish register is evidence; *B. N. P.* 247; but an examined copy of the register of a marriage in the Swedish ambassador's chapel at Paris, is not evidence. *Leader v. Barry*, 1 Esp. 353. It seems that the books of the King's Bench and Fleet prisons (which are evidence of the time of a prisoner's discharge) are not such public documents as that a copy of them may be given in evidence. See *Salte v. Thomas*, 3 B. and P. 190. The genuineness of the post-office mark may be proved by any postmaster; *Fletcher v. Braddyll*, Stark. Ev. Appx. to p. 853; or, as it seems, by any one who is in the habit of receiving letters by the post. *Abbey v. Lill*, 5 Bingh. 299.*

Proof of Entries in Corporation Books.

Corporation books are allowed to be given in evidence when they have been publicly kept as such, and when the entries have been made by the proper officer, or by a third person, in the absence or sickness of the proper officer. *R. v. Mothersell*, 1 Str. 92. A book kept by the prosecutor's clerk, who was not an officer of the corporation, containing minutes of corporate proceedings, but which had not been kept as the public book of the corporation, was rejected in evidence. *Ibid.* If the books are ancient, it must be shown that they come from the proper custody, as from a chest which has always been in the custody of the clerk of the corporation; *Mercers of Shrewsbury v. Hart*, 1 Carr. and P. 114;† it is not sufficient if they are brought from a chest found in the house of a former clerk after his death. *Ibid.* Where, in order to prove a person a freeman of Evesham, a copy upon a two shilling stamp

* 16 Eng. Com. Law Reps. 452. † 11 Id. 335.

was produced of a loose paper upon a file, which the witness said was also on a two shilling stamp, and it appeared that there was a book in which the acts of the corporation were kept, and where there was an entry more at large of the freeman's admission, and which was made when the freeman was originally admitted, but this was not on a stamp in the book, it was held by Noel, J. that the loose paper being the only effectual act, as having that which the law requires, viz. the proper stamp, must be looked upon as the proper and original act of the corporation, and that a copy of it was good evidence. *R. v. Head, Peake Ev.* 92 (n). Corporation books may be proved by examined copies; *Brocas v. Mayor, &c. of London*, 1 Str. 306; but if they do not relate to corporate acts the original must be produced. *R. v. Gwyn*, 1 Str. 401.

Proof of Public Registers.

Registers of baptisms, marriages, and deaths, may be proved by examined copies, or by production of the register itself. *B. N. P.* 247. See 52 Geo. III. c. 146. The copy need not be stamped. *Id.* s. 17. *Viva voce* proof of the contents of a register has been admitted without a copy; but it was observed by Mr. Justice Buller, that the propriety of such evidence may well be doubted, because it is not the best evidence the nature of the thing is capable of. 2 *Evans, Polh.* 139. In order to prove the register of a marriage, it is not necessary to call the attesting witnesses; but as the register affords no proof of the identity of the parties, some evidence of that fact must be given, as by calling the minister, clerk, or attesting witnesses, if they were acquainted with the parties; or the bell-ringers may be called to prove that they rung the bells, and came immediately after the marriage, and were paid by the parties; or the handwriting of the parties may be proved; or persons may be called who were present at the wedding dinner, &c. *Birt v. Barlow, Dougl.* 162. To prove the handwriting of the parties in the register, it is not necessary to call the subscribing witness. *Per Lord Mansfield, Dougl.* 174. If a marriage is proved by a person who was present, it is not necessary to prove the registration, or license, or banns. *Allison's case, R. and R., C. C. R.* 109.

Proof of Ship's Register.

By stat. 6 Geo. IV. c. 110, s. 43, it is enacted, "that the collector and comptroller of his majesty's customs at any port or place, and the person or persons acting for them respectively, shall, upon every reasonable request by any person or persons whomsoever, produce and exhibit for his, her, or their inspection and exami-

nation, any oath or affidavit taken or sworn by any owner or owners, proprietor or proprietors, (of the vessels mentioned in the act,) and also any register or entry into any book or books of registry required by this act to be made or kept, relative to any ship or vessel; and shall, upon every reasonable request by any person or persons whomsoever, permit him, her, or them, to take a copy or copies, or an extract or extracts thereof respectively; and that the copy or copies of any such oath or affidavit, register or entry, shall, upon being proved to be a true copy or copies thereof respectively, be allowed and received as evidence upon every trial at law, without the production of the original or originals, and without the testimony or attendance of any collector or comptroller, or other person or persons acting for them respectively, in all cases as fully, and to all intents and purposes, as such original or originals, if produced by any collector or collectors, comptroller or comptrollers, or other person or persons acting for them, could or might legally be admitted or received in evidence."

Proof of Terriers.

An old terrier or survey is not in general admissible in evidence without proof of its having come from the proper repository. 1 *Stark. Ev.* 170. So an old grant to an abbey, contained in a manuscript entitled "Secretum Abbatis," in the Bodleian library, was rejected, as not coming from the proper repository. *Michell v. Rabbetts*, cited 3 *Taunt.* 91. So an ancient grant to a priory, from the Cottonian manuscripts in the British Museum, was rejected, it not appearing that the possession of the grant was connected with any person having an interest in the estate. *Swinerton v. Marquis of Stafford*, 3 *Taunt.* 91. With regard to ecclesiastical terriers, the proper repository for them is the registry of the bishop, or of the archdeacon of the diocese, *Atkins v. Hatton*, 2 *Anstr.* 386, *Potts v. Durant*, 3 *Anst.* 795; or the church chest, *Armstrong v. Hewitt*, 4 *Price*, 218; and a terrier found in the registry of the dean and chapter of Lichfield has been admitted as against a prebendary of Lichfield, *Miller v. Forster*, 2 *Anstr.* 386 (n); but merely private custody is not sufficient. *Potts v. Durant*, 3 *Anstr.* 789. See also *Atkins v. Drake*, *McCl. and Y.* 213. On an issue to try the boundaries of two parishes, an old terrier or map of the limits, drawn in an inartificial manner, brought from a box of old papers relating to the parish, in the possession of the representatives of the rector, was rejected, it not being signed by any person bearing a public character or office in the parish. *Earl v. Lewis*, 4 *Esp.* 3.

Proof of Deeds and Writings.

Production of instrument under Subpœna duces tecum.] A witness served with a subpœna duces tecum, must be ready to produce the writings in his possession, if ordered by the court. *Amey v. Long*, 9 East, 473; but if the production would have a tendency to subject him to a criminal charge, or to a penalty or forfeiture, the court will excuse the non-production. See *Whitaker v. Hod*, 2 Taunt. 115. So if he state that they are his title-deeds, no judge will ever compel him to produce them. *Per Cur. Pickering v. Noyes*, 1 B. and C. 263; and see *R. v. Upper Boddington*, 8 D. and R. 726.* The solicitor to a commission of bankrupt is bound under this subpœna to produce the proceeding under the commission; *Pearson v. Fletcher*, 5 Esp. 91. *Corson v. Dubois*, Holt, 239.* *Cohen v. Templar*, 2 Stark. 260.* *Hawkins v. Howard*, R. and M. 64; but see *Bateson v. Hartsink*, 4 Esp. 43. *Laing v. Barclay*, 3 Stark. 42,* contra; unless the production be prejudicial to the assignees. *Per Gibbs, C. J., Corsen v. Dubois*, Holt, 240.* An attorney is not bound to produce a composition deed in which his client is interested, and the production of which he conceives may be prejudicial to his client, in a suit between other parties. *Harris v. Hill*, 3 Stark. 140.* *Ditcher v. Kenrick*, 1 C. and P. 161.* A person producing papers under a *spa. duc. tec.* need not be sworn. *Davis v. Dale*, 1 M. and M. MSS.

Attesting witness must be called.] Wherever a deed or other instrument is subscribed by an attesting witness, such witness must be called to prove the execution; and his testimony cannot be dispensed with, though the defendant has admitted the execution, in his answer to a bill in Chancery. *Call v. Dunning*, 4 East, 53; but see *Bowles v. Longworthy*, 5 T. R. 366, ante, p. 26. A notice to quit, *Doe v. Durnford*, 2 M. and S. 62; or a warrant to distrain, *Higgs v. Dixon*, 2 Stark. 180, if attested, must be proved by calling the attesting witness.

But where the attesting witness is dead, *Anon.* 12 Mod. 607, or blind, *Wood v. Drury*, 1 Ld. Raym. 734, or insane, *Currie v. Child*, 3 Campb. 283, or infamous, *Jones v. Mason*, 2 Str. 833, or absent in a foreign country, or not amenable to the process of the superior courts. *Prince v. Blackburn*, 2 East, 253, as in Ireland, *Hodnet v. Forman*, 1 Stark. 90,* or where he cannot be found after diligent inquiry, *Cunliffe v. Sefton*, 2 East, 183, evidence of the witness's handwriting is admissible. With regard to the inquiry necessary to let in such evidence, it has been held, that an inquiry after an attesting witness to a bond at the residences of the obligor and obligee is sufficient, *ibid.*; so diligent inquiry at the witness's usual place of residence, and information there, and from the witness's father,

* 8 Eng. Com. Law Reps. 72. * 16 Id. 348. * 3 Id. 86. * 3 Id. 341. * 14 Id. 154. * 14 Id. 170. * 11 Id. 456. * 3 Id. 384. * 2 Id. 309.

that he had absconded to avoid his creditors. *Crosby v. Percy*, 1 *Campb.* 303, 1 *Taunt.* 385, S. C.; but see *Pytt v. Griffiths*, 6 *B. Moore*, 538, *contra*. So that a twelvemonth since, a commission of bankrupt issued against the witness, to which he had not appeared. *Wardell v. Farmer*, 2 *Campb.* 282. So, that on inquiry, after the witness at the Admiralty, it appeared by the last report, that he was serving on board of some ship. *Parker v. Hoskins*, 2 *Taunt.* 223. So that the witness went abroad twenty years ago, and has never been heard of since. *Per* *Ld. Ellenborough*, *Doe v. Johnson*, 1 *Phill. Ev.* 455 (n); see *ante* p. 18. A witness, on being subpoenaed, said he would not attend, and the trial was twice put off in consequence of his absence; search was then made at defendant's house, and in the neighbourhood; and upon information at the defendant's that the witness was gone to Margate, inquiry was made there without success. It was held that, under these circumstances, evidence of his handwriting was admissible. *Burt. v. Walker*, 4 *B. and A.* 697.* So, it was held sufficient to show that the witness, some time before, had expressed an intention of leaving the country, that he had reason for so doing to avoid a criminal charge, and that his relations had not seen him since he expressed his intention of going. *Kay v. Brookman*, 3 *C. and P.* 555.† In these cases it seems sufficient to prove the handwriting of the witness, without proving the handwriting of the party, unless with a view to establish the identity of the party; but slighter evidence of that fact would be sufficient. See *Nelson v. Wittall*, 1 *B. and A.* 19. *Gough v. Cecil*, *MS. cited* *Sehr. N. P.* 516 (n). Indeed identity of name is sufficient evidence of the identity of the parties; *Page v. Mann*, 1 *M. and M.* 79. *Kay v. Brookman*, *Id.* 286, 3 *C. and P.* 555, S. C.;‡ even where the defendant has signed only by his mark. *Mitchell v. Johnson*, 1 *M. and W.* 176. It is not sufficient ground for admitting evidence of the witness's handwriting, that he is unable to attend from illness, and lies without hope of recovery. *Harrison v. Blades*, 3 *Campb.* 437. See *Doe v. Evans*, 3 *C. and P.* 221§.

Where the witness was incompetent at the time of the attestation, as where he was interested at that time, *Swire v. Bell*, 5 *T. R.* 371, it is the same in effect as if the instrument had never been attested; and it will be necessary to prove the handwriting of the party who has executed it. But if a party knowing the witness to be interested, requests him to attest the instrument, he cannot afterwards object to his competency. *Honeywood v. Peacock*, 3 *Campb.* 196. Where the witness becomes interested after the attestation, a distinction is to be observed. In general, proof of the handwriting of the witness will be admitted, as where the witness becomes interested as administrator; *Godfrey v. Norris*, 1 *Str.* 34, *Cunliffe v. Sefton*, 2 *East*, 183; or by marriage with one of the parties. *Buckley v. Smith*, 2 *Esp.* 697. So, as it seems, where a

* 17 Eng. Com. Law Reps. 56. † 6 *Id.* 569. ‡ 14 *Id.* 446. § 14 *Id.* 273.

man enters into partnership, and becomes interested in instruments which he has attested, by acquiring a share in the credits, and taking upon himself the responsibilities of the firm, his handwriting may be proved. See *Hovill v. Stephenson*, 5 Bingh. 496.^a But where the plaintiff in an action on a charter-party had communicated to the attesting witness an interest in the adventure, subsequently to the execution of the instrument, it was held that evidence of his handwriting was inadmissible. *Hovill v. Stephenson*, 5 Bingh. 493.^a Where the name of a fictitious person is inserted as witness, *Fasset v. Brown, Peake*, 23; or where the subscribing witness denies any knowledge of the execution, *Talbot v. Hodson*, 7 Taunt. 251,^a (overruling *Phipps v. Parker*, 1 Campb. 412,) *Fitzgerald v. Elsee*, 2 Campb. 635, *Lemon v. Dean*, Id. 636 (n), *Bozer v. Rabith, Gow*, 175; or where the attesting witness subscribed his name without the knowledge or consent of the parties, *McCraw v. Gentry*, 3 Campb. 232; in these cases it becomes necessary to prove the instrument by calling some one acquainted with the handwriting of the party executing it; or who was present at the time of execution.

Where there are two attesting witnesses, and one of them is incompetent, or his evidence cannot be obtained, the other witness must be called, and evidence of the handwriting of the former witness will not be sufficient. See *Cunliffe v. Sefton*, 2 East, 183. But where a bond is attested by two witnesses, and one of them is dead, and the other beyond the reach of the process of the court, proof of the handwriting of the witness that is dead is sufficient. *Adam v. Kerr*, 1 P. and B. 360.

Execution, how proved.] In proving a deed, it is not essentially necessary that the witness should see the party sign or seal; if he sees him deliver it already signed and sealed, or sealed only, it will be sufficient. 1 *Phill. Ev.* 448. Thus, proof by the attesting witness that she was not present when the deed was executed, but that she was afterwards requested by one of the parties to sign the attestation, is sufficient evidence of the execution of the deed by such party, *Grellier v. Neale, Peake*, 146; and witnesses may be called to prove the handwriting of the remaining parties, in which case sealing and delivery may be presumed. *Ibid.* It is not necessary for the attesting witness to prove that certain blanks which existed in the deed were filled up at the time of execution. *England v. Roper*, 1 Stark. 304.^b Where a party executes a deed with a blank in it, which is afterwards filled up with his assent, and he subsequently recognises the deed as valid, the filling up of the blank will not avoid it. *Hudson v. Revett*, 5 Bingh. 368;^c and see *Hall v. Chandless*, 4 Bingh. 123.^d Some proof of the identity of the party executing the instrument must be given; and there-

^a 15 Eng. Com. Law Reps. 515. ^b 2 Id. 91. ^c 2 Id. 400. ^d 15 Id. 467. ^e 13 Id. 369.

fore, where the witness to a bond stated that he saw it executed by a person who was introduced under the name of Hawkshaw (the name of the defendant), but could not identify him with the defendant, the plaintiff was nonsuited. *Parkins v. Hawkshaw*, 2 Stark. 239.* *Middleton v. Sandford*, 4 Campb. 34. *Sed vide Hennell v. Lyon*, 1 B. and A. 182, ante, p. 57. Where a bond was executed by the defendant, and attested by a witness in one room, and was then taken into an adjoining room, and at the request of the defendant's attorney, and in the defendant's hearing, was attested by another witness, who knew the defendant's handwriting, it was held that the execution might be proved by the latter witness, the whole being considered as one entire transaction. *Park v. Mears*, 2 B. and P. 17; and see *Anon. MS. Archib. Pl. and Ev.* 378. In proving the execution of a deed, the attesting witness frequently states that he does not recollect the fact of the deed being executed in his presence; but that, seeing his own signature to it, he has no doubt that he saw it executed; and this has always been received as sufficient proof of the execution. *Per Bayley, J. Maugham v. Hubbard*, 2 M. and R. 7. 8 B. and C. 16, S. C.†

The sealing of the deed need not take place in the presence of the witness; it is sufficient if the party acknowledge an impression already made to be his seal. Where one partner, in the presence of his copartner, executed a deed for both, but there was only one seal, and it did not appear whether the seal had been put twice upon the wax, it was held, that no particular mode of delivery was requisite, and that it was sufficient if a party executing a deed treated it as his own. *Balt. v. Dunsterville*, 4 T. R. 313. But where a deed is executed under the authority of a power, requiring it to be under the hands and seals of the parties, the parties must use separate seals. Thus, by stat. 8 and 9 Will. III. c. 30, certificates are required to be under the hands and seals of the overseers and churchwardens; and it was held that a certificate signed by two churchwardens and one overseer, but bearing two seals only, was not a valid certificate. *R. v. Austrey*, 1 Phill. Ev. 453. 6 M. and S. 319, S. C. The circumstance of a party writing his name opposite to the seal on an instrument which purports to be sealed and delivered by him, is evidence of a sealing and delivery to go to a jury. *Talbot v. Hodson*, 7 Taunt, 251.* So when a witness is dead, proof of the handwriting of such witness is evidence of every thing on the face of the paper which imports to be sealed by the party. *Per Buller, J. Adams v. Kerr*, 1 B. and P. 361; and see *Grellier v. Neale, Peake*, 146.

In the delivery of a deed no particular form is necessary. Throwing down the deed upon a table, with the intent that the other party shall take it up, is sufficient. *Com. Dig. Fait*, (A. 3).

* 3 Eng. Com. Law Reps. 332. † 15 Id. 147. ‡ 2 Id. 91.

Affixing the common seal is a sufficient delivery of a deed by a corporation. *Ibid.* Where a deed is delivered by virtue of a power of attorney, the power should be produced. *Johnson v. Mason*, 1 *Esp.* 89. In some instances a general agent has been presumed to have such authority. *Doe v. East London W. W. Co.* 1 *M. and M.* 149. But, in general, the agent must be authorized by deed. *Berkely v. Hardy*, 8 *D. and R.* 102.^a A condition previously expressed, though not introduced into the act of delivery, is sufficient to make the delivery of the deed as an escrow. *Per Abbott, C. J., Johnson v. Baker*, 4 *B. and A.* 441 ;¹ and see *Murray v. Earl of Stair*, 2 *B. and C.* 82.^a Where a person delivers a deed in the presence of a witness, but retains it in his own possession, there being nothing to show that it was not intended to operate immediately, it will take effect as a deed, and not as an escrow ; and the delivery of a deed to a third party, for the use of the party in whose favour the deed is executed, is good, though that party be not the agent of the latter. *Doe v. Knight*, 5 *B. and C.* 671.¹

Where a deed was executed by the defendant, a marksman, and the attesting witness was abroad, proof of the handwriting of the witness, and that the defendant had spoken of the term which he took under the deed, was held sufficient. *Doe v. Paul*, 3 *C. and P.* 613.^a So the mark may be proved by a person who has seen the party make his mark, and can speak to it. *George v. Surrey*, 1 *M. and M.* MSS.

Proof of handwriting.] The handwriting of a party may be proved by a witness who has seen him write ; and, if a witness states that he has only seen him write once, but thinks the signature is his writing, it is evidence to go to the jury, though he says that he can form no belief on the subject. *Garrels v. Alexander*, 4 *Esp.* 37. But where the witness had only once seen the party write, and then for the purpose of making him a witness in the suit, he was rejected by Lord Kenyon. *Stranger v. Searle*, 1 *Esp.* 15. And where the witness stated that he had merely seen the witness subscribe his name to another instrument to which he was the attesting witness, and was unable to form an opinion respecting the handwriting, without examining such other instrument, it was held insufficient. *Filliter v. Minchin*, *Manning's Index*, 131. However, a witness who has seen a party write, but has forgotten the character of the handwriting, may refresh his memory by referring to the instrument which he saw the party write. *Burr v. Harper*, *Holt*, 420.^a It was held by Lord Ellenborough, that the full signature of an acceptor was not sufficiently proved by a witness who had seen him write his name but once before, when he used only the initial of his Christian name. *Powell v. Ford*, 2 *Stark.* 164.^o But in a late case *Abbott, C. J.*, said, that he would not abide by

^a 11 Eng. Com. Law Reps. 251. ¹ 6 Id. 479. ² 9 Id. 33. ³ 12 Id. 351.

⁴ 14 Id. 483. ⁵ 3 Id. 147. ⁶ 3 Id. 296.

that decision; and ruled that a witness who had seen the defendant write his name "Mr. Sapio," was competent to prove the signature to a bill, "L. B. Sapio." *Lewis v. Sapio*, 4 M. and M. 39.

A written correspondence with the party, although the witness has never seen him write, will be sufficient to enable him to speak to the handwriting; for when letters are sent directed to a particular person, and on particular business, and an answer is received in due course, a fair inference arises that the answer was sent by the person whose handwriting it purports to be. *Per Lord Kenyon, Cary v. Pitt, Peake, Ev. App.* 86; and see *Thorpe v. Gisburne*, 2 C. and P. 21.* So where a witness who had never seen the defendant, but had corresponded with a person of the defendant's name living at Plymouth Dock, where the defendant resided, and where, according to other evidence, there was no other person of the same name, stated that the handwriting in question was the handwriting of the person with whom he corresponded, the evidence was held sufficient. *Harrington v. Fry, R. and M.* 90. A witness who has received letters from the party in answer to letters written to him by the witness, may prove the handwriting, though the witness has never done any act in consequence of the receipt of such letters. *Doe v. Wallinger, Manning's Index*, 131. To prove the handwriting of a member of parliament, the opinion of a clerk employed to inspect franks, who never had occasion to apply to the member to verify his handwriting, has been held insufficient. *Batchelor v. Sir J. Honeywood*, 2 Esp. 714. *Cary v. Pitt, Peake, Ev. App.* 84.

A comparison of handwritings, without any other knowledge of the character of the handwriting, furnishes no evidence. See *Macpherson v. Thoytes, Peake*, 20. *Greaves v. Hunter*, 2 C. and P. 477.† Though a witness, who has seen a party write, may refer to that writing to retouch and strengthen his recollection, and not merely for the purpose of comparison. *Burr v. Harper, Holt*, 420, *supra*.‡ And in the case of ancient documents, where it is impossible for a witness to swear that he has seen the party write, it is sufficient if the witness has acquired his knowledge of the handwriting by the inspection of other ancient writings bearing the same signature, and preserved as authentic documents. *B. N. P.* 238, *Taylor v. Cooke*, 8 Price, 652. *Roe v. Rawlins*, 7 East, 282 (n). But where there is no proof or presumption that the document, with which the instrument produced has been compared, was written by the party whose handwriting is to be proved, the evidence of the witness who compared them is inadmissible. *Randolph v. Gordon*, 5 Price, 312. Authentic ancient writings may be laid before a witness at the trial for his inspection; and after forming a judgment of their character, his belief, as to the handwriting of the document in question, may be inquired into. *Doe v. Tarver, R.*

* 12 Eng. Com. Law Reps. 8. † 12 Id. 225. ‡ 3 Id. 147.

and *M. 143*: and see *Brune v. Rawlins*, 7 *East*, 282. In several cases, where the fact of the genuineness of certain handwriting has been in question, persons skilled in the examination of handwriting, and in the detection of forgeries, have been allowed to state their opinion, whether a particular writing is in a genuine or imitated character; *Goodtitle v. Braham*, 4 *T. R.* 497. *R. v. Cator*, 4 *Esp.* 117, 144. *Stranger v. Searle*, 1 *Esp.* 14; but such evidence has been rejected at *nisi prius*; and doubts have been expressed by some of the judges of the King's Bench as to its admissibility. *Gurney v. Langlands*, 5 *B. and A.* 330; and see *Cary v. Pitt*, *Peake's Ev. App.* 85.

Where the question was, whether the acceptance of a bill was forged or genuine, Lord Kenyon allowed other bills, admitted to be the genuine handwriting, to be handed to the jury for the purpose of comparison. *Allesbrook v. Roach*, 1 *Esp.* 351. And in *Griffith v. Williams*, 1 *Crom. and Jer.* 47, it was held that the rule as to the comparison of handwriting applies only to witnesses, who compare a writing to which they are examined with the character of the handwriting impressed upon their own minds; but that it does not apply to the court or jury, who may compare the two documents when they are properly in evidence. See also *Allport v. Meek*, 4 *C. and P.* 267.

Proof of execution, when dispensed with.] Where a deed is thirty years old it proves itself; and no evidence of its execution is necessary; *B. N. P.* 255; and so with regard to receipts coming from the proper custody; *Wynne v. Tyrwhitt*, 4 *B. and A.* 376; letters, *Beer v. Ward* 1 *Phill. Ev.* 458; a will produced by the officer of the Ecclesiastical Court; *Doe v. Lloyd*, *Peake, Ev. App.* 91; a bond, *Chelsea W. W. v. Cauper*, 1 *Esp.* 275; see *Forbes v. Wales*, 1 *Blackst.* 532; and other old writings. *Fry v. Wood*, *Schw. N. P.* 517 (n). Where an old deed is offered in evidence, without proof of execution, some account ought to be given of its custody; *B. N. P.* 255; or it should be shown that possession has accompanied it; *Gilb. Ev.* 97. But it has been held sufficient to produce a certificate of settlement thirty years old, without showing that it had been kept in the parish chest. *R. v. Ryton*, 5 *T. R.* 259. Even if it appear that the attesting witness is alive, and capable of being produced, it is unnecessary to call him where the deed is thirty years old. *Marsh v. Colnett*, 2 *Esp.* 665; *B. N. P.* 255; and see *Rees v. Mansell*, *Schw. N. P.* 517, *Doe v. Wolley*, 8 *B. and C.* 22. If there is any rasure or interlineation in an old deed, it ought to be proved in the regular manner by the witness, if living, or by proof of his handwriting, and that of the party, if dead. *B. N. P.* 255.

Where a party producing a deed, under a notice to produce, claims a beneficial interest under it, it will not be necessary for

the party calling for the deed to prove the execution of it. *Pearce v. Hooper*, 3 Taunt. 62. *Orr v. Morris*, 3 B. and B. 139.* Thus, in an action by a lessee against the assignee of a lease, the plaintiff having proved the execution of a counterpart of the lease, and the defendant having put in the original lease, which was produced by a party to whom he had assigned it, it was held to be unnecessary for the plaintiff to call the subscribing witness to prove the execution of the original lease. *Burnett v. Lynch*, 5 B. and C. 589.* And where, in ejectment, the attorney for the lessor of the plaintiff obtained from one of the defendants a subsisting lease of the premises, to prevent its being set up by the defendants, it was held that this was a recognition of the lease as a valid instrument; and that, when produced in pursuance of notice from the defendants, it might be read without proof of execution. *Doe v. Heming*, 6 B. and C. 28,* 9 D. and R. 15. S. C. But where the party producing the deed does not claim an interest under it, the party calling for it must prove it in the regular manner. *Ibid.* *Gordon v. Secretan*, 8 East, 548.

In an action against a sheriff for taking insufficient pledges in replevin, the replevin bond produced by the defendant is admissible in evidence against him, without proof of execution. *Scott v. Waithman*, 3 Stark. 169,* and see *Barnes v. Lucas*, R. and M. 284.

A deed may be given in evidence under a rule of court without proof of execution, for the consent is conclusive. *B. N. P.* 256. So if the execution of the deed be one of the admissions in the cause, *ante*, p. 30; or if money has been paid into court on the count in which the deed is stated, *ante*, p. 31, the execution need not be proved.

Where the plaintiff declared on a deed, which he averred to be in the possession of the defendant, who pleaded *non est factum*, and at the trial the deed was proved to be in the hands of the defendant, who had been served with notice to produce, it was held, that on the non-production of the deed, the plaintiff might give parol evidence of the contents, without calling the subscribing witness, who was in court. *Cook v. Tanswell*, 8 Taunt. 450.* 2 B. Moore, 513, S. C. *Jackson v. Allen*, 3 Stark. 74.* So where the plaintiff declared on a lost bond, and a witness stated that there were subscribing witnesses' names to the bond, but that he did not know the names, it was ruled by Lord Kenyon, that the plaintiff might recover without calling either of the attesting witnesses. *Keeling v. Ball*, Peake, Ev. App. 82. But if the witnesses are known they must be called. *Gillies v. Smither*, 2 Stark. 528.*

Where a deed requiring enrolment by statute is accordingly enrolled, proof of the enrolment by a copy examined with the enrolment, will dispense with evidence of the execution by any of the

* 7 Eng. Com. Law Reps. 382. * 12 Id. 327. * 13 Id. 99. * 14 Id. 176.
* 4 Id. 163. * 14 Id. 165. * 3 Id. 460.

parties to the deed. *Thurtle v. Madison, Syles*, 462. *Smartle v. Williams*, 3 Lev. 387. 1 Salk. 280, S. C. B. N. P. 255. 2 *Evans's Poth.* 155. 10 Ann. c. 18. s. 3. So where a deed not requiring enrolment is enrolled on the acknowledgment of one of the parties, it seems to be evidence against that party, without calling the attesting witnesses. *Ibid.*

Custody of ancient writings.] In general, the admissibility of ancient writings, which are incapable of direct proof, depends upon the custody from which they are produced, and which furnishes ground of authentication. Thus ancient ecclesiastical terriers are not admissible, unless found in the proper repository, viz., the registry of the bishop, or of the archdeacon of the diocese; *ante*, p. 8; or, as it seems, the church chest; *Armstrong v. Hewitt*, 4 Price, 216; which are also the proper repositories for the vicar's books. *Ibid.* On an issue respecting boundaries of two parishes certain old papers were produced by the plaintiff (the rector of one of the parishes), which had come into the possession of the son of a former rector, on his father's death, and which had been delivered by him as papers belonging to the parish, to the witness (an attorney,) and it was held that the papers were sufficiently authenticated without calling the son of the former rector. *Earl v. Lewis*, 4 Esp. 1. But where a book, purporting to be the book of a former rector, came out of the custody of the defendant, the grandson of the former rector, the proof was held insufficient, it not appearing how it came into the defendant's possession. *Randolph v. Gordon*, 5 Price, 312. In a suit for tithes, a receipt purporting to be a receipt given by a former rector, forty-five years ago, to a person of the same name as the defendant, and produced from the custody of the defendant, has been held admissible. *Bertie v. Beaumont*, 2 Price, 303. An ancient writing, enumerating the possessions of a monastery, produced from the Herald's Office, is inadmissible. *Lygon v. Strutt*, 2 Anstr. 601; and see *Potts v. Durant*, 3 Anstr. 789, *ante*, p. 63. And where A., the defendant in a tithe suit, offered in evidence a receipt, purporting to be a receipt from one B. to one A., fifty years before, without showing who B. was, or where the paper had been kept, it was rejected. *Manley v. Curtis*, 1 Price, 225. *Wood B. diss.*; see also *Buller v. Bichell*, 2 Price, 399.

Proof of Wills.

Production of the will.] In order to prove a devise of lands the will itself must be produced, an exemplification, or probate of the will is not evidence. *B. N. P.* 246. *Comb.* 46. If the will is lost the register book, or ledger book; *St. Legar v. Adams*, 1 *Ld. Raymond*, 731. *B. N. P.* 246 1 *Phill. Ev.* 478; or an examined copy,

or if there be no such copy, parol evidence may be received as secondary evidence of its contents, but the probate will not be received as such evidence. *Doe v. Calvert*, 2 Campb. 389.

What witnesses must be called.] To prove a will in a court of law it is sufficient to call one of the witnesses, if he can speak to all the requisites of attestation; *B. N. P.* 264. *Longford v. Eyre*, 1 P. Wms. 741; but on an issue out of Chancery all the witnesses ought to be called. *Booth v. Blundell*, 1 Cooper, 136.

Signing by the devisor.] By the statute of frauds, 29 Ch. II. c. 3, s. 5, all devises and bequests of lands or tenements shall be in writing, and signed by the party so devising the same, or by some other person in his presence, and by his express directions; and shall be attested and subscribed, in the presence of the devisor, by three or four credible witnesses, or else shall be utterly void, and of none effect. Notwithstanding some earlier cases to the contrary, it seems to be now the established rule, that sealing, without signing, is not a sufficient execution within the statute. *Smith v. Evans*, 1 Wils. 313. *Grayson v. Atkinson*, 2 Ves. 459. *B. N. P.* 263. 1 *Phill. Ev.* 480. It is sufficient if the testator sign his name at the beginning of the will. *Lemayne v. Stanley*, 3 Lev. 1, 1 *Freem.* 538, S. C. If the will is written on several sheets, and the testator signs some, and intends to sign the rest, but does not, this is not a sufficient execution; *Right v. Price*, 2 Dougl. 241; but where a will, written on three sides of a sheet of paper, concluded by stating that the testator had signed his name to the first two sides, and had put his hand and seal to the last, and in fact he had put his hand and seal to the last, but had omitted to sign the two other sides, the execution was held good, the signing of the last sheet showing that the former intention had been abandoned. *Winsor v. Pratt*, 2 B. and B. 650.¹ Where the testator is blind, it is not necessary to read over the will in the presence of the attesting witnesses previously to execution. *Longchamp v. Fish*, 2 N. R. 415.

Attestation.] The statute does not direct that the witnesses shall see the testator sign; and therefore it is sufficient if the testator acknowledge to the witnesses, either separately or all together, that the will or the handwriting is his. *Stonehouse v. Evelyn*, 3 P. Wms. 254. *Grayson v. Atkinson*, 2 Ves. 454. *Ellis v. Smith*, 1 Ves. 11. If the witnesses set their marks to the will it is a sufficient attestation; *Harrison v. Harrison*, 8 Ves. 185; and they may attest it at several times; *Cook v. Parson*, *Prec. in Chanc.* 185; but in that case one witness alone will not be able to prove the due execution of the will. The witnesses need not attest every page, or know the contents, but all the will should be in the room

¹ 6 Eng. Com. Law Reps. 290.

at the time of attestation; whether it was so or not is a question for the jury. *Bond v. Seawell*, 3 Burr. 1773. 1 Wm. Bl. 407. S. C. *Lea v. Libb*, 3 Mod. 262. By the statute of frauds the witnesses must attest and subscribe the will in the presence of the testator; but it is sufficient if the testator was in such a position that he might see the witnesses attest, as where he was in one room and the witnesses in another, where he might have seen them through a broken window. *Shires v. Glasscock*, 1 Salk. 688. So where the testator was in bed, and the witnesses retired through a small passage into another room, and attested the will on a table opposite to the door, which was open, as well as the door of the testator's room. *Davy v. Smith*, 3 Salk. 395. *Todd v. Ld. Winchelsea*, 1 M. and M. 12. 2 C. and P. 488, S. C.* So where the testatrix sate in her carriage opposite the window of the attorney's office in which the will was attested. *Casson v Dade*, 1 Br. C. C. 99. But where the will was attested in an adjoining room, and the jury found that in one part of the room in which the testator was, a person inclining forward with his head out of the door, might have seen the witnesses, but that the testator was not in such a situation in the room that he might, by inclining forward, have seen them, the execution was held invalid. *Doe v. Manifold*, 1. M. and S. 294.

Proof where the witnesses are dead, or deny their attestation.] Where the witnesses are dead, their handwriting, and that of the testator, should be proved, and though the attestation does not express that the witnesses subscribed the will in the presence of the testator, yet a jury may presume that fact in favour of the will. *Croft v. Paulet*, 2 Str. 1109. *Bruce v. Smith, Willes*, 1. *Hands v. James*, Com. 531. Even though all the witnesses to a will should swear that the will was not duly executed, evidence may be adduced in support of the will. *Lowe v. Joliffe*, 1 W. B. 365. Where two of the witnesses are dead, and the surviving witness charges them with fraud in the attestation of the will, evidence of their good character is admissible. *Doe v. Walker*, 4 Esp. 50; see *Bishop of Durham v. Beaumont*, 1 Campb. 207; *Provis v. Reed*, 5 Bingh. 435.^b

Proof of wills thirty years old.] In a court of law, a will of thirty years old, if the possession has gone under it, and sometimes without the possession, but always with the possession, if the signing is sufficiently recorded, proves itself; but, if the signing is not sufficiently recorded, it is a question whether the age proves its validity, and then possession under the will, and claiming and dealing with the property, as if it had passed under the will, is cogent evidence to prove the duly signing, though it should not be recorded. *Per Lord Eldon, Lord Ranchliffe v. Parsons*, 6 Dow, 202; and see *Doe v. Lloyd*,

* 12 Eng. Com. Law Reps. 227. ^b 15 Id. 490.

Peake, Ev. App. 91. 2 C. and P. 440.¹ The thirty years should be computed from the date of the will, and not from the death of the testator. *McKensie v. Fraser*, 9 Ves. 5. *Calthorpe v. Gough*, cited 4 T. R. 707. 3 Stark. Ev. 1694. *Doe v. Wolley*, 6 B. and C. 22.²

Witnesses.] By stat. 25 Geo. II. c. 6, s. 1, if any person shall attest the execution of any will or codicil, to whom any beneficial devise, legacy, estate, interest, gift, or appointment of, or affecting any real or personal estate, other than and except charges on lands, tenements, or hereditaments, for payments of debts, shall be thereby given or made, such devise, &c. shall, so far only as concerns such person attesting the execution of such will or codicil, or any other person claiming under him, be null and void, and such person shall be admitted a witness to the execution of such will or codicil. It has been held by the present Master of the Rolls, *Emanuel v. Constable*, 3 Russell, 436, and by Sir John Nicholl, *Brett v. Brett*, 3 Adams, 210,¹ affirmed by the Delegates, that this clause does not extend to wills of personal estate only; and that a legacy to a person who is attesting witness to such a will is not void. A contrary doctrine was held by Sir W. Grant, *Lees v. Summersgill*, 17 Ves. 508. By sec. 2, if a creditor of the deviser, whose will is charged with the payment of the debt, attests the will, he shall be admitted as a witness. By sec. 3, a witness whose legacy has been paid or accepted, or released, or who shall have refused to accept such legacy on tender made, shall be admitted a witness; and by sec. 5, a legatee dying in the lifetime of the testator, or before he shall have received a release, or refused to receive his legacy, shall be a competent witness. Where the attesting witness is the husband of a devisee who takes an estate in fee in remainder under the will, he is not made competent by the statute. *Hatfield v. Thorp*, 5 B. and A. 589.²

Proof of Execution of Powers.

All the circumstances required by the creators of a power, however unessential and otherwise unimportant they be, must be observed, and cannot be satisfied but by a strict and literal performance. *Per Lord Ellenborough, Hawkins v. Kemp*, 3 East, 440. Thus, where the power was to be executed "by any deed or writing under the hands and seals of the parties, to be by them duly executed in the presence of, and attested by two or more witnesses," it was held, that as the attestation stated only a sealing and delivery, the power was not duly executed; *Doe v. Peach*, 2 M. and M. 576; and a subsequent correct attestation indorsed upon the instrument after the death of one of the parties will not remedy the defect. *Ibid. Wright v. Wakeford*, 4 Taunt. 214. So if the

¹ 12 Eng. Com. Law Reps. 209. ² 15 Id. 150. ³ 2 Eng. Eccles. Reps. 498.
⁴ 7 Eng. Com. Law Reps. 199.

power is to be executed by an appointment to be signed and *published* in the presence of, and attested by two witnesses, and the attestation omits to mention the publication. *Moodie v. Reid*, 7 Taunt. 355; ^a and see *Wright v. Barlow*, 3 M. and S. 512, *M. Queen v. Farquhar*, 11 Ves. 467. Where the attestation is defective, it cannot be supplied by evidence that the witness did in fact see the party sign, &c. as well as seal. *Doe v. Peach*, 2 M. and S. 576. The defect of omitting to state in the attestation the signing of the instrument is cured by stat. 54 Geo. III. c. 168, with regard to powers theretofore executed, but the act is only retrospective. As to the execution of a power under a statute, see *R. v. Anstrey*, ante, p. 67.

Proof of Awards.

In proving an award, it is necessary to give evidence both of the submission to arbitration, and of the execution of the award; for without proof of the submission by all the parties, it would not appear that the arbitrator had competent authority to decide the whole question between the parties. *Antram v. Chace*, 15 East, 209; *Ferrer v. Oven*, 7 B. and C. 427; ^a and see *Braxier v. Jones*, 8 B. and C. 124.^b If the submission was to two arbitrators named in the reference, and to a third person to be appointed by them, the appointment of such third person to be arbitrator must be duly proved. A recital of such appointment in the award, signed by the three, will not be sufficient; nor will it be enough to show that the third person acted with the other arbitrators, and signed the award. *Still v. Halford*, 4 Campb. 19. As to proof of an award under an enclosure act, see *R. v. Haslingfield*, 2 M. and S. 558.

Proof by Witnesses.

Attendance of Witnesses.

The process to compel the attendance of witnesses is the writ of *subpœna ad testificandum*. Either the writ, or a ticket containing its substance, *Goodwin v. West*, Cro. Car. 522, 540, must be personally served on the witness within a reasonable time before the trial. Notice to a witness in London, at two in the afternoon, requiring him to attend the sittings at Westminster in the course of the same evening is too short. *Hammond v. Stewart*, 1 Str. 510. If the cause be made a remanet, the subpœna must be re-sealed and reserved. *Tidd*, 855. The witness in a civil suit is not bound to attend, unless the reasonable expenses of going to and returning from the place of trial, and of his stay there, are tendered to him at the time of serving the subpœna; nor, if he appears, is he bound to give evidence before such expenses are paid or tendered. *Chapman v. Poynton*, 13 East, 16 (n). *Holme v. Smith*, 1 Marsh, 410.^c If

^a 2 Eng. Com. Law Reps. 133. ^b 14 Id. 71. ^c 15 Id. 162. ^d 4 Id. 345.

the witness is in custody his attendance must be procured by a writ of *habeas corpus ad testificandum*. *Tidd*. 858. By stat. 44 Geo. III. c. 102, a judge of the superior courts, and any justice of great sessions in Wales, and in the County Palatine of Chester, may award a writ of *habeas corpus* to bring up a prisoner from any jail or prison in the United Kingdom, for the purpose of giving evidence in any court of record in England.

During the time consumed by a witness in going to the place of trial, in his attendance there, and in his return, he is protected from arrest. 2 *Roll. Ab.* 272; *Randall v. Gurney*, 3 B. and A. 252,* *Tidd*. 198; though he has attended, upon application, without a subpoena. *Per Lord Kenyon, Arding v. Flower*, 8 T. R. 536.

In some cases an application may be made to put off the trial on account of the absence of a material witness. An application to put off a trial beyond the existing sittings, or from sittings to sittings, is not allowed on the part of the plaintiff; for he may any time withdraw the record, if he is not prepared to try the cause. But where, from the sudden indisposition of a witness, who may be able to attend in the course of a day or two, or for any other temporary reason, the plaintiff is prevented from trying his cause in its order in the paper, yet has ground to believe he shall be able to try it before the sittings are over, it would be too much to make him withdraw his record, and a judge at *nisi prius* will therefore make an order for the trial to stand over till the witness is likely to attend. *Per Lord Ellenborough, Ansley v. Birch*, 3 Campb. 335. But in the Common Pleas, the trial can never be put off on the consent of the parties and counsel at the sittings at *nisi prius*, but the plaintiff must either proceed to try or withdraw the record. *R. M.* 50 Geo. III. 2 Taunt. 221. Where a motion is about to be made to a judge at *nisi prius*, for putting off the trial on account of the absence of a witness, notice should first be given to the plaintiff's attorney, with a copy of the intended affidavit. 1 *Phill. Ev.* 16. The affidavit may be made by the defendant, or by his attorney. *Duberley v. Gunning, Peake*, 97. See the form, Appendix.

Incompetency from want of Understanding.

Insane persons, idiots, and lunatics, during their lunacy, are incompetent witnesses. But lunatics, in their lucid intervals, when they have recovered their understandings, are competent. *Com. Dig. Testm.* (A. 1.) A person born deaf and dumb may, if he has sufficient understanding, give evidence by signs through an interpreter; *Ruston's case*, 1 *Leach*, C. C. 455, 3rd edition; or if he can write, that is the more certain mode. *Per Best, C. J., Morrison v. Lennard*, 3 C. and P. 127.* Children not able to comprehend the moral obligation of an oath cannot be examined; *Com. Dig.*

* 5 Eng. Com. Law Reps. 271. * 14 Id. 238.

ubi sup. B. N. P. 293 ; but children of any age may be examined on oath, if capable of distinguishing between good and evil. *Brazier's case*, 1 East, P. C. 443. Where the child cannot be sworn, the account which it has given of the transaction to others is inadmissible. *R. v. Tucker*, 1 Phill. Ev. 19.

Incompetency from want of Religious Principle.

Atheists, and such infidels as profess no religion that can bind their consciences to speak the truth, are excluded from being witnesses. B. N. P. 292. *Omichund v. Barker, Willes*, 549. But infidels, as Gentoos, who believe in God, the avenger of falsehood, are received as witnesses. *Omichund v. Baker, Willes*, 549. All persons ought to be sworn according to the ceremonies of their religion. *Id.* 547. *Atcheson v. Everett, Cowp.* 390. Jews on the Pentateuch ; *Id.* 544 ; Mahometans on the Koran. *Morgan's case*, 1 Leach, C. C. 64. So a witness who declines swearing on the New Testament, though he professes Christianity, may be allowed to swear on the Old Testament if he considers that mode binding on his conscience. *Edmonds v. Rowle, R. and M.* 77. The proper time for asking the witness whether the form of administering the oath is binding on his conscience is previous to its administration. But, if the oath is administered in the legal form, before the attention of the court or the counsel is directed to it, the question may be properly asked afterwards. If the witness should reply, that he considers the oath taken to be binding on his conscience, it would be irrelevant to ask further whether there be any other mode of swearing more binding than that used. *The Queen's case*, 2 B. and B. 284. See *Sells v. Hoare*, 7 B. Moore, 36.

The proper mode of examining a witness for the purpose of trying his competency in religious principle, is not to question him as to his particular opinions (as to whether he believes in Jesus Christ), but whether he believes in God, the obligation of an oath, and a future state of rewards and punishments ; *Per Buller, J. R. v. Taylor, Peake*, 11. 1 Phill. Ev. 24 ; and it seems sufficient if he states that he believes in a God who will reward or punish him in this world. *Omichund v. Barker, Willes*, 550.

The solemn affirmation of a quaker had the same effect as an oath in civil cases by *Stat. 7 and 8 Will. III. c. 34* ; and now, by statute 9 Geo. IV. c. 15, an affirmation has the same effect as an oath in all cases civil and criminal.

Incompetency from Infamy.

Persons convicted of treason, felony, or any species of the *crimen falsi*, as forgery, perjury, subornation of perjury, &c., are incompetent to be witnesses. *Com. Dig. Testm.* (A. 3-4). *Co. Litt.* 6 b. So a

¹ 6 Eng. Com. Law Reps. 112.

conviction for bribing a witness to absent himself. *Clancey's case*, *Fort.* 209; barratry, *R. v. Ford*, 2 *Salk.* 690; and conspiracy at the suit of the king will render a witness incompetent. *Co. Litt.* 6 *b.* But a conviction for conspiring to raise the funds by false rumours, does not, as it seems, render the party incompetent; *Crowther v. Hopwood*, 3 *Stark.* 21;^a but see 2 *Dods.* 174; but in *Bushel v. Barrett*, *R. and M.* 434, it was held by Gaselee, J., after consulting with Littledale, J., that a judgment for a conspiracy to bribe a person (summoned as a witness on an information on the revenue laws) not to appear, renders the person convicted incompetent as a witness. A conviction for keeping a gambling-house does not disqualify; *R. v. Grant*, *R. and M.* 270; but a person convicted of winning by fraud or ill-practice at certain games, seems rendered incompetent by stat. 9 Anne, c. 14, s. 6, which enacts that he shall be deemed infamous. Outlawry in a personal action does not render the party incompetent. *Co. Litt.* 6 *b.* But it is otherwise of outlawry for treason or felony. 3 *Inst.* 212. It is not the punishment, but the conviction for the offence, which causes the infamy. *B. N. P.* 292. *R. v. Ford*, 2 *Salk.* 690. The competency of infamous witnesses is restored in certain cases by statute. *Vide infra.*

Proof of Judgment.] In order to establish the incompetency of the witness on the ground of infamy, the judgment must be proved in the usual way. *R. v. Castle Careinion*, 8 *East*, 78, *ante*, p. 54. An admission by the witness himself, that he is confined under such judgment, is not sufficient to render him incompetent, however it may affect his credit. *Ibid.*

Competency of infamous witnesses, how restored.] The competency of a person who has been rendered an incompetent witness by a conviction is restored by pardon. *Com. Dig. Testm.* (A. 3-4.) And by statute 7 and 8 Geo. IV. c. 28, s. 13, where the king's majesty shall be pleased to extend his royal mercy to any offender convicted of any felony, punishable with death or otherwise, and by warrant under his royal sign manual, countersigned by one of his principal secretaries of state, shall grant to such offender either a free or a conditional pardon; the discharge of such offender out of custody, in the case of a free pardon, and the performance of the condition, in case of a conditional pardon, shall have the effect of a pardon under the great seal for such offender, as to the felony for which such pardon shall be so granted. And by stat. 9 Geo. IV. c. 32, s. 3, where any offender hath been or shall be convicted of any felony not punishable with death, and hath endured, or shall endure, the punishment to which such offender hath been or shall be adjudged for the same, the punishment so endured hath and shall have the like effects and consequences as a pardon under the great

^a 14 Eng. Com. Law Reps. 149.

seal, as to the felony whereof the offender was so convicted. By sec. 4 (reciting that there are certain misdemeanors which render the parties convicted thereof incompetent witnesses), where any offender hath been or shall be convicted of any such misdemeanor (except perjury or subornation of perjury), and hath endured or shall endure the punishment to which such offender hath been or shall be adjudged for the same, every such offender shall not, after the punishment so endured, be deemed to be, by reason of such misdemeanor, an incompetent witness in any court or proceeding, civil or criminal. Where the pardon is conditional, the performance of the condition must be proved. *Hawk. P. C. b. 2, c. 37, s. 45.* But where a man has been sentenced to transportation, and confined in the hulks for the term, and discharged at the end of it, it will not destroy the effect of the pardon that he has escaped twice, for a few hours each time. *R. v. Badcock, Russ. and Ry. C. C. 248.* Where the incompetency is by statute made part of the punishment, as in a conviction for perjury or subornation of perjury, under stat. 5 Eliz. c. 9, the king's pardon will not restore the competency of the offender. *B. N. P. 292. But see 2 Harg. Jurid. Arg. 221.*

Incompetency from Interest.

Objection, when taken.] Regularly, the objection to the competency of a witness ought to be taken on the *voir dire*, though if his incompetency is discovered at any time during the trial, his evidence will be struck out. *Turner v. Pearte, 1 T. R. 720.* However, it has been said, that a party who is cognizant of the interest of the witness at the time when he is called, is bound to make his objection in the first instance. *Ibid. 2 Stark. Ev. 757.* And after the witness has left the box, there is an end of all question as to his competency. *Beeching v. Gower, Holt, 314.* So where interrogatories and cross interrogatories were read at a trial, and from the answers it appeared that the witness was interested, Gibbs, C. J., received the evidence, ruling that the objection ought to have been made in a former stage. *Ogle v. Paleski, Holt, 485.* The party objecting may examine the witness on the *voir dire*, and also, if necessary, call another witness to prove the incompetency; if the objection is raised by independent evidence, and without putting a question to the witness, the party who called him cannot be allowed to put a question to him in order to repel the objection. 1 *Phil. Ev. 123.*

Where the witness himself is examined on the *voir dire*, he may be asked as to the contents of a written instrument without a notice to produce; though if the witness produces the instrument on which the objection is founded, it ought to be read. *Buller v. Carver, 2 Stark, 434.* The objection of interest may be removed in

the same manner as it was raised, and therefore, where the witness was objected to as next of kin, in an action by an administrator, but on re-examination answered, that he had released his interest, the objection was held to be properly removed. *Ingram v. Dade*, 1 *Phill. Ev.* 124. *Bothan v. Swinger*, 1 *Esp.* 164. *Peake*, 218, *S. C.* So where a bankrupt called as a witness, stated on the *voir dire* that he had obtained his certificate and released his assignees, Park, J., held him competent without the production of the release. *Carlisle v. Eady*, 1 *C. and P.* 284; but see *Goodhay v. Hendry*, 1 *M. and M.* 319. Where the objection is removed by independent evidence, and not on the *voir dire*, such evidence is governed by the ordinary rules. *Corking v. Jarrard*, 1 *Campb.* 37.

Time of acquiring the interest and amount.] A witness cannot, by making a wager on the point in question, render himself incompetent, and thus deprive the party of his testimony. *Barlow v. Vowell*, *Skin.* 586. And it has been laid down as a general principle, that where a person makes himself a party in interest, after a plaintiff or defendant has an interest in his testimony, he may not by this deprive the plaintiff or defendant of his testimony. *Per Grose, J. Bent v. Baker*, 1 *T. R.* 37. But it has been since held, that though the witness would not be disqualified by an agreement fraudulently entered into between him and a party for the purpose of taking off his testimony; yet, on the other hand, the pendency of a suit could not prevent third persons from transacting business *bona fide* with one of the parties; and if an interest in the event of the suit is thereby acquired, the general consequence of law must follow, that the party so interested cannot be examined as a witness for that party, from whose success he will necessarily derive an advantage. *Forester v. Pigou*, 3 *Campb.* 380. 1 *M. and S.* 9. Where subsequently to the execution of the instrument the witness becomes interested by operation of law, as by becoming executor or administrator, or by marriage, the general rule is that evidence of his handwriting is admissible. *Vide ante*, p. 65.

However small the amount of interest may be, the witness will be incompetent. *Burton v. Hinde*, 5 *T. R.* 174. *Doe v. Tooth*, 3 *Y. and J.* 19, *post*, p. 87.

What is such an interest as excludes.] The general rule is, that no objection can be made to the competency of a witness, unless he is directly interested in the event of the suit, or can avail himself of the verdict in the cause so as to give it in evidence on any future occasion in support of his own interest. *Per Ld. Kenyon, Smith v. Prager*, 7 *T. R.* 62. *Doddington v. Hudson*, 1 *Bingh.* 260. *Radburn v. Morris*, 4 *Bingh.* 649.*

* 11 *Eng. Com. Law Reps.* 378. * 8 *Id.* 314. * 15 *Id.* 98.

There are various instances in which a witness is excluded, on the ground of his being directly interested in the event of the suit. Thus a residuary legatee is incompetent in an action brought by the executor to recover a debt due to the testator. *Baker v. Tyrwhitt*, 4 *Campb.* 27. So in ejectment, where the plaintiff has made out a *prima facie* case, a witness who states that he is himself the real tenant, is incompetent for the defendant, since he would be turned out under a judgment for the plaintiff. *Doe v. Wilde*, 5 *Taunt.* 183,* and see 6 *Bingh.* 394.* So a witness who has a power of attorney from the plaintiff to receive the sum recovered, and intends to pay himself thereout a debt due from the plaintiff. *Powel v. Gordon*, 2 *Esp.* 735.

Wherever a verdict for the plaintiff would be evidence for the witness in a subsequent action by him, he is incompetent to support the plaintiff's case. Thus, if he claims a customary right of common, he is incompetent to support the case of another person claiming under the same custom, for the verdict would be evidence for himself. *Per Buller, J. Walton v. Shelley*, 1 *T. R.* 302. *Ld. Falmouth v. George*, 5 *Bingh.* 286;† and see *Le Fleming v. Simpson*, 2 *M. and R.* 169.* But it is otherwise where the right of common is claimed by prescription as belonging to the estate of another person. *Ibid. Harvey v. Collison*, 2 *Scho. N. P.* 1118. So if the plaintiff has agreed with the witness, that in case he recovers the lands, the witness shall have a lease of them for so many years, the witness is incompetent; *Gilb. Ev.* 122; for in case the witness sued on such agreement, the judgment obtained on his own evidence, would form part of his proofs. So a witness is incompetent who is to repay a sum of money to the plaintiff if he fails, but to retain it if he succeeds. *Fotheringham v. Greenwood*, 1 *Str.* 129; and see *Forrester v. Pigou*, *M. and S.* 9.

In an action on the case for negligently driving a coach against the plaintiff's waggon-horse, whereby it died, it was held that the plaintiff's wagoner was incompetent to prove the negligence of the defendant, without a release from his master. *Morish v. Foote*, 8 *Taunt.* 455;‡ and see *Rotheroe v. Elton, Peake*, 117, 3d ed.

Wherever a verdict for the plaintiff would be evidence against the witness in a subsequent action, he is incompetent to support the defendant's case. Thus in an action against a master, for the negligence of his servant, the servant is incompetent to disprove the negligence, since the verdict would be evidence of the amount of damages in an action by the master against the servant; *Green v. New River Company*, 4 *T. R.* 589; and so of an agent in an action against his principal, for negligence. *Gevers v. Mainwaring, Holt*, 139.* *Hawkins v. Finlayson*, 3 *C. and P.* 305.† So the broker who made the distress is an incompetent witness for the defendant in

* 1 *Eng. Com. Law Reps.* 68. † 19 *Id.* 111. ‡ 15 *Id.* 449. • 17 *Id.* 297.

† 4 *Id.* 164. • 3 *Id.* 53. † 14 *Id.* 319.

an action for an excessive distress. *Field v. Mitchell*, 6 Esp. 73. So in trover against a sheriff, the officer who made the levy is not a competent witness for the defendant, though he is indemnified by the execution creditor. *Whitehouse v. Atkinson*, 3 C. and P. 344.¹ But in an action against a sheriff for negligently executing a writ, an assistant of the sheriff's officer, by him employed to execute the writ, was held to be a competent witness for the sheriff, without a release from the officer, on the ground that the verdict could not be used against the witness, since he was not employed by the defendant. *Clarke v. Lucas, R. and M.* 32. In an action against the sheriff for an improper return to a *fi. fa.* stating a payment of a sum of money to the landlord for arrears of rent, the landlord is not competent to prove the rent due, for, if the action succeeded, the witness would be liable to the sheriff, and this judgment would be evidence of special damage. *Keightley v. Birch*, 3 Campb. 521. If the judgment could be used in a subsequent action against the witness, to establish the amount of costs, the whole, or a portion of which, the witness would be bound to pay, he is an incompetent witness. Thus bail cannot give evidence for their principal; *Carter v. Pearce*, 1 T. R. 164. *Hawkings, v. Inwood*, 4 C. and P. 148;² nor the wife of the bail; *Cornish v. Pugh*, 8 D. and R. 65;³ nor a person who has paid money into the hands of the sheriff on behalf of the defendant in lieu of bail. *Lason v. Higgins, D. and R. N. P. C.* 46. 3 Stark. 184, S. C.⁴ To make the bail a witness, the party may apply to the court to have his name struck off, on justifying other bail. *Tidd*, 264; and see *Baillie v. Hole*, 1 M. and M. 289, post, p. 93. On the same ground, where an infant sues, his prochein amy, or guardian, is not a competent witness for him. *James v. Hatfield*, 1 Str. 548. *Gilb. Ev.* 107; see also *Goodacre v. Breame, Peake*, 174; and the case of *Jones v. Brooke*, 4 Taunt. 464, cited post in *Assumpsit on Bills of Exchange*. If the judgment for the plaintiff would have the effect of turning the witness out of possession, he is not a competent witness for the defendant. *Doe v. Wilde*, 5 Taunt. 183.⁵ 1 Marsh. 7 S. C. *Dow v. Bingham*, 4 B. and A. 672,⁶ ante, p. 82.

It is a general rule that a bankrupt is incompetent to prove any fact in support of his commission, though he has obtained his certificate, and released his surplus and allowance. *Field v. Curtis*, 2 Str. 829. *Chapman v. Gardner*, 2 H. Bl. 279. But a bankrupt who has obtained his certificate, and released the surplus of his estate, is competent to prove the handwriting of the commissioners, in order to identify the proceedings taken under the commission against him; for the validity of the commission does not depend upon that signature, but upon the facts contained in the deposition to which the signature is subscribed. *Morgan v. Pryor*, 2 B. and C. 14.⁷

¹ 14 Eng. Com. Law Reps. 339. ² 19 Id. 315. ³ 16 Id. 335. ⁴ 14 Id. 176.

⁵ 1 Id. 68. ⁶ 6 Id. 560. ⁷ 9 Id. 8.

The declaration of a bankrupt also, at the time of his absenting himself, are evidence to establish an act of bankruptcy, by showing with what intention he absented himself. *Ante*, p. 21. *Rawson v. Haigh*, 2 Bingh. 99.¹ 9 B. Moore, S. C.; and see post *Actions by Assignees of Bankrupts*. An insolvent is not a competent witness for the plaintiffs, in an action by his assignees, for his future property is liable; *Delafield v. Freeman*, 4 C. and P. 67;² and the creditor of an insolvent who has assigned his effects to trustees, is not a competent witness for the defendant, the insolvent, in an action defended by the trustees, it being doubtful whether the estate will pay 20s. in the pound. *Crerer v. Sodo*, 3 C. and P. 10.³

What is not such an interest as excludes.] The circumstance of the witness standing in the same situation as the party by whom he is called is not sufficient to exclude his evidence. Thus in case of two actions brought against two persons for the same assault, in the action against one the other may be a witness. *Per Ashurst, J., Walton v. Shelley*, 1 T. R. 301. So in an action against an underwriter, another underwriter on the same policy is a good witness for the defendant. *Bent v. Baker*, 3 T. R. 27. A witness who believes himself interested, but is not so in fact, is competent; thus a witness who believes himself under an obligation of honour to indemnify the bail, but who has entered into no engagement to indemnify, is competent. *Pederson v. Stoffles*, 1 Campb. 145. There are, however, authorities that a witness who believes himself *legally* interested is incompetent. See *Trelawney v. Thomas*, 1 H. Bl. 307, and the cases cited 1 Phill. Ev. 52 (n). 2 Stark. Ev. 747 (n). Unless the verdict would be evidence for or against the witness, in a subsequent action, it is no objection to his competency that the jury might hear of and be biassed by it. *R. v. Bray*, Rep. temp. Hard. 358. The borrower of money for a usurious consideration is a competent witness for the plaintiff, in an action for penalties against the lender. *Abrahams v. Bunn*, 4 Burr. 2251. In trover by A. against B., C. is a competent witness to prove property in himself. *Ward v. Wilkinson*, 4 B. and A. 410.⁴

Where a witness is equally interested on both sides he is a competent witness for either. Thus in an action for money had and received, a witness may prove the money paid by the defendant to him, as agent for the plaintiff, since he is liable to one or the other of the parties. *Ilderton v. Atkinson*, 7 T. R. 480. So the payee of an accommodation note is competent to prove that he indorsed it to the plaintiff before it became due in payment for goods; for, though he would be liable to the plaintiff for goods sold, if the action failed, yet, if it succeeded, he would be liable to the defendant for

¹ 9 Eng. Com. Law Reps. 335. ² 19 Id. 277. ³ 14 Id. 185.

⁴ 6 Id. 466.

money paid. *Shuttleworth v. Stephens*, 1 Campb. 408. See also *Banks v. Kain*, 2 C and P. 597.*

The circumstance that the witness would be exposed to an action, in case the fact in question is found against his testimony, is not sufficient to render him incompetent. Thus, a person who has filled a corporate office may be called to show the usage of the office, though if his acts be illegal, he would be liable to a *quo warranto*. *R. v. Bray*, Rep. temp. Hardw. 358. The bare possibility of an action being brought against a witness is no objection to his competency, and therefore, in an action against an administrator, one of the bond securities for the defendant's due administration of the intestate's effects, is a competent witness on behalf of the defendant to prove a tender. *Carter v. Pearce*, 1 T. R. 163; but see *Morish v. Foote*, 8 Taunt. 455,* ante, p. 82.

Trustees and executors in trust, not taking a beneficial interest, are competent witnesses for their cestui que trust, &c. *Gilb. Ev.* 120. *Lowe v. Jolliffe*, 1 W. Bl. 366. *Goodtill v. Welford*, Doug. 140. And a creditor who has assigned his debt, though only by parol, is a competent witness to increase the fund out of which the debt is to be paid. *Heath v. Hall*, 4 Taunt. 326.

Agents are competent witnesses for their principals for the sake of trade and the common usage of business. *B. N. P.* 289. Thus a factor may prove a sale, though he is to receive the extra amount beyond a stated sum. *Benjamin v. Porteous*, 2 H. Bl. 590. So servants and carriers are competent, without a release, to prove the payment or receipt of money, or the delivery of goods. *Green v. New River Company*, 4 T. R. 590. *Spencer v. Goulding*, Peake, 129. An apprentice therefore is a competent witness to prove that he has paid money by mistake. *Martin v. Horrel*, 1 Str. 647. And in an action against a carrier for not delivering a parcel, his servant is competent to prove the delivery. *Ross v. Rowe*. 3 Ford's MSS. 98, cited 2 Stark. Ev. 754. But if a person enters into a contract for the purchase of goods in his own name, he is not a competent witness in an action for goods sold and delivered, to prove that he purchased them as agent for the defendant. *McBraine v. Fortune*, 3 Campb. 317. The rule, that agents are competent witnesses, does not extend to acts which are tortious, and out of the ordinary course of their employment; thus in an action against a master for the negligence of his servant, the latter is incompetent to disprove the negligence. *Green v. New River Company*, 4 T. R. 589, ante, p. 83. It has been held that the rule, as to admitting the evidence of agents, does not extend to a person who is only employed as an agent in the particular transaction in question. *Edmonds v. Lowe*, 8 B. and C. 408, post.*

Though, in general, informers entitled to part of the penalty are

* 12 Eng. Com. Law Reps. 279. * 4 Id. 164. * 15 Id. 250.

not competent witnesses, yet, where a statute can receive no execution unless a party interested be a witness, he must then be admitted. *Gilb. Ev.* 128. Thus in an action under stat. 2 Geo. II. c. 24, s. 8, for penalties for bribery at elections, the informer is a competent witness. *Bush v. Ralling, Say.* 289. *Howard v. Shipley, 4 East,* 180. So by various statutes persons interested are made competent witnesses. Thus in an action against churchwardens or overseers for money mis-spent by them, inhabitants of the parish who do not receive alms, or any gift out of the parochial collection, are rendered competent witnesses by stat. 3 Will. III. c. 11, s. 12. So where penalties are given to the use of the poor, for the benefit and exoneration of the parish, or other place, the inhabitants are rendered competent witnesses by stat. 27 Geo. III. c. 29, provided the penalty does not exceed 20*l.* *R. v. Davis,* 6 *T. R.* 177. So in an action against the hundred by a party robbed, the inhabitants of the hundred may be witnesses by stat. 8 Geo. II. c. 16, s. 15, and the party robbed is competent to prove the robbery, and the extent of his loss. *B. N. P.* 187. Again, in cases relative to the execution of the highway act, the surveyor of the parish is a competent witness, though part of his salary may arise from penalties imposed by the stat. *Stat. 13 Geo. III. c. 78, s. 69.* So by stat. 54 Geo. III. c. 170, s. 9, no inhabitant or person rated or liable to be rated to any rates or cesses of any district, parish, township, or hamlet, or wholly or in part maintained thereby, or executing or holding any office thereof or therein, shall be deemed on such account an incompetent witness for or against such district, parish, &c. in any matter relating to such rates or cesses, or relating to the boundary between such district, parish, &c. and any adjoining district, &c. or in any matter relating to any order of removal to or from such district, or to the settlement of any pauper in such district, or touching any bastards, chargeable &c. or touching the recovery of any sum for the charges or maintenance of such bastards, or the election or appointment of any officer, or the allowance of the accounts of any officer of any such district. Under this statute, a person who occupies rateable property within a chapelry, is a competent witness to prove that a certain messuage is situated within the chapelry. *Marsden v. Stansfield,* 7 *B. and C.* 815.* The statute renders inhabitants competent in an action by the surveyor of highways against his predecessor for penalties. *Hendebourck v. Langston,* 1 *M. and M.* 402 (n).

Incompetency of Witness, as Party to the Suit.

A person who is a party on the record, though he be merely a trustee, *Bauerman v. Radenius,* 7 *T. R.* 668, is incompetent as a wit-

* 14 Eng. Com. Law Reps. 137.

ness for himself or a joint suitor; *Gilb. Ev.* 180; though in an action against the governors of the Foundling Hospital, for work done by the plaintiff for the use of the hospital, Lord Kenyon admitted several of the governors as witnesses for the defence. *Weller v. Governors of F. H. Peake*, 153. So where the mayor and commonalty of London were plaintiffs, and the question was, whether the corporation were entitled to certain tolls, it was held, that freemen, members of the corporation, might be called in support of the claim, because the tolls were received for the benefit of the whole corporate body; *R. v. the Mayor and Com. of London*, 2 *Lev.* 231; and see 1 *Vent.* 351. *Sutton Coldfield v. Wilson*, 1 *Vern.* 254. *Gilb. Ev.* 126. *Peake's Ev.* 174; but this decision has been doubted. *B. N. P.* 290. *Burton v. Hinde*, 5 *T. R.* 174. And in a very late case, it was held, that a corporator was not a competent witness in an action brought by the corporation, even though he had released his interest in the subject matter of the suit, since in case of a verdict against the plaintiffs, the corporate funds would be decreased by the amount of the costs. *Doe v. Tooth*, 3 *Y. and J.* 19. If the witness is substantially a party to the record he is incompetent, though not actually a party on the record. Thus, in an action against one of several partners, the defendant cannot call one of his copartners, and it is doubtful whether he can render him competent by a release. *Simons v. Smith, R. and M.* 29; see *post*, p. 89. Where trustees for public purposes are empowered by statute to sue in the name of their treasurer, a trustee is not a competent witness for the plaintiff in an action so brought. *Whitmore v. Wilks*, 1 *M. and M.* 214.

There are some exceptions to this rule.—Thus, in an action on the stat. of Winton, 13 Ed. I. c. 2, the plaintiff (the party robbed) may prove the robbery, and the amount of the loss; but he is not competent to prove any other facts in support of his case, as that the place where he was robbed is within the hundred. *B. N. P.* 187. *Per Page, J. R. v. Reading*, *Rep. Temp. Hard.* 83. 2 *Roll. Ab.* 685. The party robbed is competent, though his servant was present. *Merrick v. Hundred of Ossulston*, cited 3 *F.* 95. 3 *Stark. Ev. Appendix to p.* 681. In an action also for a malicious prosecution, the evidence given by the defendant on the indictment is said to be admissible for the defendant on the trial of the action. *Cobb v. Car*, *B. N. P.* 14; and see *Johnson v. Browning*, 6 *Mod.* 216.

A party to the suit cannot be compelled to give evidence for the opposite party. Thus, in an action of ejectment on the several demises of two lessors, one of the lessors is not compellable to give evidence for the defendant, though no title is proved in him; *Fenn v. Granger*, 3 *Campb.* 178; but one of several co-plaintiffs may be called for the defence, if he does not himself object. *Norden v. Williamson*, 1 *Taunt.* 378; but see 3 *Stark. Ev.* 1061.

Co-defendant, when competent.] Where a person is *arbitrarily* made defendant to prevent his testimony, he may, if nothing is proved against him, be sworn as a witness for the other defendants; *B. N. P.* 285; but one of several defendants, against whom nothing is proved, is not, as a matter of right, entitled to a verdict at the close of the plaintiff's case, so as to make him a competent witness for his co-defendants. *Emmett v. Butler*, 7 *Taunt.* 607.⁷ And it has been ruled by Best, C. J. that a co-defendant against whom the plaintiff has given no evidence, has no right to an acquittal until all the other evidence for the defendants is finished. *Wright v. Paulin, R. and M.* 128; and see *Huxley v. Berg*, 1 *Stark.* 98.⁷ The time of taking such an acquittal is in the discretion of the judge, and it may be taken whenever it is most convenient. *Per Lord Tenterden, Carpenter v. Jones*, 1 *M. and M.* 198 (n). And in assumpsit, where one defendant pleads a plea operating in his personal discharge, a verdict may be taken for him on that plea, and he may then be examined as a witness for his co-defendants. *Bate v. Russell*, 1 *M. and M.* 332.

Where one of several defendants pleads his bankruptcy and certificate in bar, and a nolle prosequi is entered as to him, he is a competent witness for his co-defendants, for in case of a verdict for the plaintiff, the demand of the co-defendant against the witness would be barred by the certificate. *Moody v. King*, 2 *B. and C.* 558.^a And even where the defendants were parturs in the transaction, it was held that the one who pleaded his bankruptcy and certificate, and against whom a nolle prosequi was entered, was a good witness for his co-defendant, after releasing his surplus, since the co-defendant's demand in case of a verdict for the plaintiffs would be proveable under the witness's commission. *Aflalo v. Feudrinier*, 6 *Bingh.* 306.^b 1 *M. and M.* 334 (n), S. C. But one of several defendants cannot be called as a witness, unless he has either been acquitted or a nolle prosequi has been entered as to him. *Raven v. Dunning*, 3 *Esp.* 25. *Emmett v. Butler*, 7 *Taunt.* 599.⁷

Where one of several defendants suffers judgment by default in an action *on a contract*, he is not competent, for the other defendants, to negative the contract, because, if the action should fail as to one, it would fail as to all the defendants; *Brown v. Fox*, 1 *Phill. Ev.* 78, cited 8 *Taunt.* 141; nor is he competent for the plaintiff, for should the plaintiff succeed, the witness would be entitled to contribution against his co-defendants. *Brown v. Brown*, 4 *Taunt.* 752; see also *Mant v. Mainwaring*, 8 *Taunt.* 139.^c 2 *B. Moore*, 13, S. C.

⁷ 2 Eng. Com. Law Reps. 232. ^a 2 Id. 313. ^b 9 Id. 177. ^c 19 Id. 89. ^d 4 Id. 48.

Where one of several defendants suffers judgment by default in an action of *tort*, he is a competent witness for his co-defendants; for though they should be acquitted, he would still remain liable, and he is not liable to the costs of the issue tried against the others. *Ward v. Haydon*, 2 Esp. 553. But where the jury were as well to try the issues as to assess the damages against him who had suffered judgment to go by default, Best, C. J. refused to receive the evidence of the latter for his co-defendants. *Mash v. Smith*, 1 C. and P. 577.⁴ A co-trespasser who has suffered judgment by default, is not a competent witness for the plaintiff against his co-defendants. *Chapman v. Graves*, 2 Campb. 333 (n). *Mant v. Mainwaring*, 2 B. Moore, 13. 8 Taunt. 139, S. C. In an action of ejectment, however, against two defendants, one of the defendants who has suffered judgment by default was held by Lord Ellenborough to be a competent witness for the plaintiff to prove the other defendant in possession, on the ground that the only supposed interest imputable to him was the possibility of the plaintiff suing the other defendant only in an action for mesne profits, in case he recovered in the ejectment. *Doe v. Green*, 4 Esp. 198.

Co-trespasser and co-contractor, when competent.] In an action of trespass, a co-trespasser not sued may be called as a witness for the plaintiff, though left out of the declaration for that purpose, and though satisfaction from the defendant is a discharge as to him. *B. N. P.* 286. *Chapman v. Graves*, 2 Campb. 333 (n). *Morris v. Daubigny*, 5 B. Moore, 319, *Berkeley v. Dimery*, 10 B. and C. 113. *Blackett v. Weir*, 5 B. and C. 387.⁵ *Hall v. Curzon*, 9 B. and C. 647;⁶ but see *Lethbridge v. Phillips*, 2 Stark. 546;⁷ and 2 Stark. Ev. 764 (n). So a co-trespasser not joined may be called by the defendant. *Poplet v. James*, B. N. P. 286. A witness who is proved to be a partner with the defendant in a contract is not competent to prove that he alone is liable to the plaintiff, for he would discharge himself from his share of the costs in case the plaintiff recovered. *Goodacre v. Bream*, Peake, 175. *Hall v. Rex*, 6. Bingh. 181.⁸ *Evans v. Yeatherd*, 2 Bingh. 133.⁹ 9 B. Moore, 272. S. C. It is doubtful whether he can be rendered competent by a release from the defendant. *Young v. Bainer*, 1 Esp. 103. *Simons v. Smith*, R. and M. 29, *Cheyne v. Koop*, 4 Esp. 112. A co-contractor with the defendant, not joined, is a competent witness for the plaintiff. *Blackett v. Weir*, 5 B. and C. 385.⁵ *Fawcett v. Wrathall*, 2 C. and P. 305.¹⁰ *Hall v. Curzon*, 9 B. and C. 646.¹¹ So upon an issue on a plea in abatement for non-joinder of another contractor, the latter is a competent witness for the plaintiff to prove that the contract was made with the defendant alone. *Hudson v. Robinson*, 4 M. and S. 475.

It was formerly held that a dormant partner not joined as plain-

⁴ 11 Eng. Com. Law Rep. 478. ⁵ 4 Id. 48. ⁶ 16 Id. 402. ⁷ 11 Id. 257.

⁸ 17 Id. 466. ⁹ 3 Id. 467. ¹⁰ 19 Id. 47. ¹¹ 9 Id. 345. ¹² 12 Id. 138.

tiff, might be called as a witness for the plaintiff on the ground that he could not be joined; *Lloyd v. Archboule*, *Mawman v. Gillett*, 2 Taunt. 325; but as it is now decided that a dormant partner may be joined; *Skinner v. Stocks*, 4 B. and A. 437;* it seems to follow that he cannot be called as a witness. 1 Saund. 291, i (n). •

Incompetency of Husband and Wife.

Neither the husband nor wife of a party to the suit is competent to give evidence for or against such party; *B. N. P.* 286; and so, though not a party to the suit, if the husband or wife of the witness be interested in the event of the suit. Thus, in an action by the executrix of a surviving trustee under a marriage settlement, to recover the value of certain goods sold by the defendant as sheriff under an execution against the husband of the *cestui que trust*, the husband is not competent to prove on the part of the plaintiff, that the goods have been conveyed to the plaintiff in trust for the separate use of the witness's wife. *Davis v. Dinwoody*, 4 T. R. 678. But, in an action between third persons, if the evidence of the wife merely tend to expose her husband to a legal demand, she is not incompetent. Thus, in an action for goods sold and delivered, a woman is competent to prove that they were sold, not on the credit of the defendant, but of her husband. *Williams v. Johnson*, 1 Str. 504. A wife cannot be examined against her husband, in a criminal case, even with his consent. 1 Hale, P. C. 47. But where the plaintiff called the wife of the defendant, *Best, C. J.* said that he would allow her to be examined if the defendant consented, but not without. *Pedley v. Wellesley*, 3 C. and P. 558.° A widow cannot be asked to disclose conversations between herself and her late husband. *Doker v. Hasler, R. and M.* 198; but see *Beveridge v. Minter*, 1 C. and P. 364.º

Whether a woman who has cohabited with a man as his wife, is on that account an incompetent witness, where he is concerned, has been considered a doubtful question. *Campbell v. Twenlow*, 1 Price, 81. On a trial for forgery, Lord Kenyon refused to admit a woman as a witness for the prisoner, who had in court represented her as his wife, but, on hearing an objection taken to her competency, denied his marriage with her. *Id.* 83, cited by *Richards, B.* But in a very late case, the court of Common Pleas held that a woman who had lived with the defendant as his wife, and passed by his name, might be called as a witness for him. *Bathews v. Galingo*, 4 Bingh. 610.ª

Declarations of Husband or wife when admissible.] Where the husband is party to the suit, the general rule is, that the declara-

° 6 Eng. Com. Law. Reps. 478. • 14 Id. 448. ¢ 11 Id. 421. ¤ 15 Id. 88.

tions of the wife are not evidence against him. Thus, in trespass against husband and wife, the wife's admission of a trespass committed by her is not evidence to affect the husband. *Denn v. White*, 7 T. R. 112. In an action for criminal conversation with the plaintiff's wife, her letters to the defendant are not evidence for the latter, nor is her confession evidence for her husband, but conversations between her and the defendant are evidence against him. *B. N. P.* 28. Letters from the wife to the husband, written before suspicion of criminal intercourse, are admissible to show their demeanor and conduct, and whether they were living on terms of mutual affection, but it ought to be strictly proved that the letters were written at a time when the wife was not suspected of misconduct. *Edwards v. Crock*, 4 Esp. 39. *Trelawney v. Coleman*, 1 B. and A. 90. Where the wife has acted as the agent of the husband by his authority, her admissions will bind him in the same manner as the admissions of any other agent. See *ante*, p. 31.

Incompetency of Counsel or Solicitor.

Who are incompetent.] Counsel; see *Curry v. Walter*, 1 Esp. 456; solicitors, and attorneys, are the only persons who cannot be compelled to reveal communications made to them in confidence; *R. v. Duchess of Kingston*, 20 How. St. Tr. 612; therefore, physicians, surgeons, and divines, are bound to disclose such communications. *Ibid.* So a clerk to the commissioners of the income tax, who is bound by his oath of office not to disclose what he should learn as such clerk, except by the consent of the commissioners, or by force of an act of parliament, is not privileged by his oath of office from disclosing in court what he has learned as clerk. *Lee v. Birrell*, 3 Campb. 337. A person who acts as interpreter; *Du Barré v. Levette*, Peake, 73; or as agent; *Parkins v. Hawkshaw*, 2 Stark. 239; between the attorney and his client; or the attorney's clerk; *Taylor v. Forster*, 2 Car. and P. 195. *R. v. Upper Bodington*, 8 D. and R. 732; cannot be called upon to reveal a confidential communication. So a barrister's clerk cannot be called to prove his master's retainer. *Foot v. Hayne*, R. and M. 165.

Where a disclosure is made to a magistrate or agent of government relative to matters of state, the name of the person making the disclosure is not allowed to be revealed. *Vide post*.

A person who is not an attorney may be compelled to disclose communications which have been made to him under a mistaken idea that he was an attorney. *Fountain v. Young*, 6 Esp. 113.

What matters may be disclosed.] Matters communicated to an at-

torney not in his professional capacity, as if he be under-sheriff at the time, must be disclosed. *Wilson v. Rastall*, 4 T. R. 753. So matters communicated to him after the termination of the suit, of which they were the subject, without a view to the objects of the suit. *Coledon v. Kenrick*, 4 T. R. 431. And so matters communicated before the retainer. *Cuts v. Pickering*, 1 Vent. 197. All matters not confidentially communicated must be disclosed, as well as all matters which the attorney might have known without being intrusted as attorney in the cause. *B. N. P.* 284. Thus an attorney may be called to prove a deed executed by his client, which he has attested. *Doe v. Andrews*, Cowp. 846. So to prove the contents of a notice to produce, or an erasure in a deed belonging to his client; *B. N. P.* 284; or the delivery of a particular paper by his client; *Eicke v. Nokes*, 1 M. and M. 304; or to prove who has employed him to defend the cause; *Levy v. Pope*, 1 M. and M. 410; or that he is in possession of a particular document so as to let in secondary evidence of its contents. *Bevan v. Waters*, id. 235. So a communication between an attorney and his client relative to a matter of fact only, where the character or office of attorney is not called into action, is not privileged. *Bramwell v. Lucas*, 2 B. and C. 745.* An attorney professionally employed to prepare an assignment of goods, which he declines to make, will not be allowed to disclose the instructions given him; *Cromack v. Heathcote*, 2 B. and B. 4;† nor to prove the contents of deeds or abstracts deposited with him. *R. v. Upper Boddington*, 8 D. and R. 732. But if such deeds form no part of his client's title, he is bound to produce them. *Doe v. Thomas*, 9 B. and C. 288.‡ It has been held at *nisi prius*, that only what is communicated to an attorney for the purpose of bringing an action or suit, or relating to an action or suit existing at the time, or contemplated, is privileged from disclosure. *Williams v. Mundie*, R. and M. 34; and see 2 Swanst. 199 (n). *Wadsworth v. Hamshaw*, Mann. Index, 374; but see *Cromack v. Heathcote*, 2 B. and B. 4.† *Broad v. Pitt*, 1 M. and M. 233. 3 C. and P. 518, S. C.‡ Formerly the rule was extended farther. Thus where one S. who had drawn an indenture between a sheriff and his under-sheriff was called to prove a corrupt agreement between them, he was not compelled to discover the matter of it, and (*per Holt, C. J.*) it seems to be the same law of a scrivener. *Anon. Skin.* 404. *Vin. ab. (B a) pl.* 10. It appears that the witness had been the plaintiff's attorney. *Lilly*, P. R. 556, S. C. So in Chancery it has been held, that the protection extends not merely to communications made pending an action or suit, but to every communication by the client to counsel, or attorney, or solicitor, for professional assistance. *Walker v. Wildman*, 6 Madd. 47.

The privilege is that of the client, and not of the attorney; and

* 9 Eng. Com. Law Reps. 233. † 6 Id. 1. ‡ 16 Id. 348.

† 17 Id. 380. ‡ 14 Id. 423.

the court will prevent the attorney, though he be willing, from making the disclosure, *B. N. P.* 284. *Wilson v. Rastall*, 4 T. R. 759, unless the client waive the privilege, which he may do. *Merle v. More*, R. and M. 390. And if the attorney of one of the parties is called by his client, and examined as to a matter which has been the subject of confidential communication, he may be cross-examined as to such matter, though not as to others. *Valliant v. Dodemead*, 2 Atk. 524.

Incompetency from Interest, how removed.

The interest of the witness may be divested before trial by payment or release, and his competency will then be restored. Thus a legatee who has been paid before trial is a competent witness to increase the estate. *Clarke v. Gannon*, R. and M. 31. *Sewell v. Stubbs*, 1 C. and P. 73.* So a release from the defendant, the drawer of a bill of exchange, to the acceptor, will render the latter a competent witness. *Scott v. Lifford*, 1 Campb. 249. In an action against a minor who appears by guardian, a release from the guardian is insufficient. *Fraser v. Marsh*, 2 Stark. 41.* A residuary legatee is not a competent witness in an action by an executor to recover a debt due to his testator, by releasing all claim to the debt in question; for the plaintiff, though not liable to pay costs to the opposite side, must pay costs to his own attorney, which would diminish the witness's residue. *Baker v. Tyrwhit*, 4 Campb. 27. If the witness offers to release or surrender his interest, and executes a release accordingly, his competency is restored, though the other party refuse to accept the release. *Bent v. Baker*, 3 T. R. 35. *Goodtitle v. Welford*, Dougl. 139. So if the party on whose side the witness is interested makes an offer to remove his interest, and the witness refuses, that will not deprive the party of his testimony. 1 *Phill. Ev.* 128. A release from one of several joint plaintiffs is sufficient. *Hockless v. Mitchell*, 4 Esp. 86.

The bail for the defendant may be made a competent witness for him by the defendant's depositing, in the hands of the officer of the court, a sum equal to the sum sworn to and the costs of the action. The judge will then make an order for striking his name off the bail-piece. *Baillie v. Hole*, 1 M. and M. 289; and see *ante*, p. 83.

Examination of Witnesses.

Ordering Witnesses out of Court.] During the examination of a witness the court will, in general, on the application of either of the parties, order all the other witnesses in the cause to go out of court. But it seems, that if the attorney in the cause is a witness

* 11 Eng. Com. Law Reps. 319. * 3 Id. 235.

he will be suffered to remain, his assistance being absolutely necessary to the proper conduct of the cause. *Pomeroy v. Baddeley*, R. and M. 430; but see *R. v. Webb*, 3 Stark. Ev. 1733. If the witness remains after being ordered to withdraw, it will not necessarily prevent his being examined, *R. v. Colley*, 1 M. and M. 329, it being in the discretion of the judge to permit it or not; *Parker v. M^r William*, 6 Bingh. 683;^b except in the Exchequer, where the witness is peremptorily excluded. *Att.-General v. Bulpit*, 9 Price, 4, 6 Bingh. 684.^b

Leading questions.] It is a general rule that leading questions are inadmissible on examination of a witness in chief; questions to which the answer Yes, or No, would not be conclusive, are not in general objectionable. Thus a witness called to prove that A. and B. are partners, may be asked whether A. has interfered in the business of B.; *Nicholls v. Dowding*, 1 Stark. 81;^c for though he may have interfered, he may not be a partner. So where a witness, called to prove the partnership of the plaintiffs, could not recollect their names so as to repeat them without suggestion, but said he might probably recognise them if suggested, Lord Ellenborough held that there was no objection to asking the witness whether certain specified persons were members of the firm. *Acerro v. Petroni*, 1 Stark. 100.^d Where a witness on his examination in chief, shows himself decidedly adverse to the party calling him, it is in the discretion of the judge to allow the examination to assume the form of a cross-examination; and where the witness stands in a situation which of necessity makes him adverse to the party calling him, the counsel may, as a matter of right, examine him as upon a cross-examination. *Clarke v. Saffrey*, R. and M. 126.

Where a witness for the plaintiff was cross-examined as to the contents of a lost letter, and swore that it did not contain a certain passage, and a witness was called for the defendant to contradict this statement, Lord Ellenborough ruled, that after exhausting the memory of the latter witness as to the contents of the letter, he might be asked if it contained a particular passage recited to him, which had been sworn to on the other side, for that otherwise it would be impossible ever to come to a direct contradiction. *Courteen v. Touse*, 1 Campb. 43. Where a witness is called to prove a contradictory statement made by another witness, the most unexceptionable and proper course appears to be, to ask the witness what the other witness said relative to the transaction in question, or what account he gave, and not in the first instance to ask whether he said so and so, or used such and such expressions. 1 *Phill. Ev.* 257. However, where in cross-examination, a witness being asked as to some expressions which he had used, denied them, and the

^b 19 Eng. Com. Law Reps. 204. ^c 2 Id. 305. ^d 2 Id. 393.

counsel on the other side called a person to prove that the witness had used such expressions, and read to him the particular words from his brief, *Abbott, C. J.* held that he was entitled to do so. *Edmonds v. Walter, 3 Stark. 7.*

Cross-examination.] Upon cross-examination, counsel may lead a witness so as to bring him directly to the point as to the answer; but he cannot, if the witness show a leaning in his favour, go the length of putting into the witness's mouth the very words which he is to echo back again. *Hardy's case, 24 How. St. Tr. 755.* It is not competent to counsel, on cross-examination, to question a witness concerning a fact wholly irrelevant (if answered affirmatively) to the matter in issue, for the purpose of discrediting him if he answers in the negative, by calling other witnesses to disprove what he says; *Spencely v. De Willott, 7 East, 109*; and should the witness answer such question, evidence cannot be given to contradict him. *Harris v. Tippet, 2 Campb. 637. R. v. Watson, 2 Stark, 157.* Where a witness is brought into court merely for the purpose of producing a written instrument to be proved by another witness, he need not be sworn; and unless sworn, the other party will not be entitled to cross-examine him. *Simpson v. Smith, MS. 1822. 1 Phill. Ev. 260. Davis v. Dale, 1 M. and M. ante.* When once sworn, though he give no evidence for the party calling him, a witness may be cross-examined. *Phillips v. Eamer, 1 Esp. 357.* A witness called by the plaintiff, and cross-examined by the defendant, and afterwards recalled by the latter, may still be examined as upon the cross-examination. *Dickenson v. Shee, 4 Esp. 67.*

A witness cannot properly be asked, on cross-examination, whether he has written such a thing; the proper course is to put the writing into his hands, and ask him whether it is his writing. *Queen's case, 2 B. and B. 293.* If, on cross-examination, a witness admits a letter to be in his handwriting, he cannot be questioned by counsel whether statements such as they may suggest are contained in it, but the whole of the letter must be read in evidence. *Id. 288.* According to the ordinary rule of proceeding, the letter is to be read as the evidence of the cross-examining counsel, as part of his evidence in his turn, after he shall have opened his case; but if the cross-examining counsel suggest to the court, that he wishes to have the letter read immediately, in order that he may found certain questions on the contents of that letter, which could not be well or effectually done without reading the letter itself, it may be permitted to be read as part of the evidence of the counsel proposing it, and subject to all the consequences of having it received as part of his evidence. *Id. 290.*

If a wrong witness is called in consequence of a mistake in his name, and is dismissed on the discovery of the mistake, the other

side have no right to cross-examine him. *Clifford v. Hunter*, 3 C. and P. 16.¹

Credit of witness, how impeached and supported.] In order to impeach the credit of a witness, evidence may be given of statements made by him, at variance with his testimony on the trial; *De Sailly v. Morgan*, 2 Esp. 691; but in order to lay a foundation for the evidence of such contradictory declaration or conversation, the witness must be asked, on cross-examination, whether he has made such declaration, or held such conversation. *Queen's case*, 2 B. and B. 301.¹ Before you can contradict a witness by showing he has, at some other time, said something inconsistent with his present evidence, you must ask him as to the time, place, and person involved in the supposed contradiction. It is not enough to ask him the general question, whether he has ever said so and so. *Per Tindal, C. J. Angus v. Smith*, 1 M. and M. 474. The witness may be re-examined as to these contradictory statements; and the counsel has a right, upon re-examination, to ask all questions which may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful, and also of the motive by which the witness was induced to use those expressions; but he has no right to go farther, and introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motives of the witness. *Queen's case*, 2 B. and B. 297.¹ There is a distinction, however, between conversations which a witness may have had with a party to the suit and a conversation with a third person. The conversations of a party to the suit, relative to the subject matter of the suit, are in themselves evidence against him in the suit; and if a counsel chooses to ask a witness as to any thing which may have been said by an adverse party, the counsel for that party has a right to lay before the court the whole which was said by his client in the same conversation; not only so much as may explain or qualify the matter introduced by the previous examination, but even matter not properly connected with the part introduced upon the previous examination, provided only that it relate to the subject matter of the suit. *Ibid.* It has been doubted, whether, to corroborate the testimony of the witness whose credit has been impeached, evidence is admissible that the witness affirmed the same thing before on other occasions; *Gilb. Ev.* 150, B. N. P. 294; but such evidence has been held inadmissible, on the ground of its not being given on oath. *R. v. Parker*, 3 Dougl. 242, but see *Luttrell v. Reynell*, 1 Mod. 283. See also 2 *Evans's Pothier*, 251, 1 *Stark. Ev.* 149, 2 *Russ. on Crimes*, 635, 2d edit.

If a witness gives evidence contrary to that which the party calling him expects, the party cannot give general evidence to show

¹ 14 Eng. Com. Law Reps. 189. ¹ 8 Id. 112.

that the witness is not to be believed on his oath. *Ewer v. Ambrose*, 3 B. and C. 749.* Nor, as it seems, is it competent to him to prove that the witness has previously given a different account of the transaction. *Id.* But he may prove the facts denied, by other witnesses. *Lowe v. Jolliffe*, 1 W. B. 365. *Alexander v. Gibson*, 2 Campb. 555. *Richardson v. Allan*, 2 Stark. 324.¹

Privilege of not answering questions.] Where a question is asked, the answer to which would tend to expose the witness to punishment, or to a criminal charge, as to convict him of the office of usury, *Cates v. Hardacre*, 3 Taunt. 424, he cannot be compelled to answer; see the cases collected, 1 Phill. Ev. 262; and therefore such questions ought not to be put. *Cundell v. Pratt*, 1 M. and M. 108. But if the time limited for the recovery of the penalty has expired, the witness may be compelled to answer. *Roberts v. Allatt*, 1 M. and M. 192. And if a witness answers any questions on a matter rendering him liable to forfeiture or punishment, he cannot afterwards claim his privilege, but must answer throughout. *East v. Chapman*, 1 M. and M. 47. The objection to such questions must come from the witness and not from the counsel in the cause. *Thomas v. Newton*, *Ibid.* 46. So he cannot be compelled to answer questions which might subject him to a forfeiture of his estate. *Ibid.* 264. And see stat. 46 Geo. III. c. 37. But a witness cannot legally refuse to answer a question relevant to the matter in issue (the answering of which has no tendency to accuse himself, or to expose him to penalty or forfeiture of any kind or nature whatsoever), on the ground that the answering of such question may establish, or tend to establish, that he owes a debt, or is otherwise subject to a civil suit. 46 Geo. III. c. 37. A witness is not compellable to answer questions which are degrading to his character; *Cooke's case*, 13 How. St. Tr. 334; *Friend's case*, 13 How. St. Tr. 17; *Layer's case*, 16 How. St. Tr. 161; though it seems that such questions may legally be asked. *R. v. Edwards*, 4 T. R. 440; *R. v. Holding*, Archb. Cr. Law, 102; *Cundell v. Pratt*, 1 M. and M. 108; and see the cases collected, 1 Phill. Ev. 269. If the witness chooses to answer the question, his answer is conclusive. 2 Watson's Trial, by Gurney, 228; see also *Rose v. Blake-more*, R. and M. 383.

A witness also is not compellable, or indeed allowed to reveal communications, the disclosure of which might be injurious to the interests of the state. Thus, questions tending to the discovery of the channels by which a disclosure of treasonable transactions was made to the officers of justice, are not permitted to be asked. *Hardy's case*, 24 How. St. Tr. 814. *R. v. Watson*, 2 Stark. 186.² So communications between the governor of a colony and his attorney general are confidential, and cannot be disclosed. *Wyatt v. Gore*, Holt, 299;³ and see *Cooke v. Maxwell*, 2 Stark. 184.⁴ So also a

* 10 Eng. Com. Law Reps. 220. ¹ 3 Id. 371. = 3 Id. 273. = 3 Id. 111. • 3 Id. 306.

letter written by an agent of government to one of the secretaries of state. *Anderson v. Hamilton*, 2 B. and B. 156 (n).²

Opinion of witness when admissible.] In general the opinion of a witness as to any of the facts in issue is inadmissible as evidence, unless upon questions of skill and judgment. Thus, in an action of trespass for cutting a bank, where the question is whether the bank, which had been erected for the purpose of preventing the overflowing of the sea, had caused the choking up of a harbour, the opinions of scientific men as to the effect of such an embankment upon the harbour are admissible. *Folkes v. Chadd*, 3 Dougl. 157. 1 Phill. Ev. 276, S. C. 4 T. R. 498, S. C. cited. And where the question is, whether a seal has been forged, seal-engravers may be called to show a difference between a genuine impression and that supposed to be false. *Ibid. per Lord Mansfield*. So a physician who has not seen the particular patient, may, after hearing the evidence of others, be called to prove, on oath, the general effects of the disease described by them, and its probable consequences in the particular case. *Peake, Ev.* 208. The opinion of a person conversant with the business of insurance may be asked, as to whether the communication of particular facts would have varied the terms of insurance, but not as to what his conduct would have been in the particular case. *Berthon v. Loughman*, 2 Stark. 258.¹ *Camden v. Cowley*, 1 W. Blacks. 417. *R. v. Wright, Russ. and Ry. C. C. R.* 456. But see *Durrel v. Bederley, Holt*, 286;² and see ante, p. 70, as to the evidence of persons skilled in forgeries. So the evidence of a ship-builder has been admitted on a question of seaworthiness, though he was not present at the survey. *Thornton v. Royal Exchange Ass. Co. Peake*, 25. So a person versed in the laws of a foreign country may give evidence as to what, in his opinion, would, according to the law of that country, be the effect of certain facts. *R. v. Wakefield, Murray's ed. p.* 238. *Chaurand v. Angerstein, Peake*, 44.

Memorandum to refresh witness's memory.] A witness will be allowed to refer to an entry, or memorandum, made by himself shortly after the occurrence of the fact to which it relates, in order to refresh his memory, and this though the entry or memorandum would not of itself be evidence; *Kensington v. Inglis*, 8 East, 289; as a receipt on unstamped paper. *Rambert v. Cohen*, 4 Esp. 213. If the witness cannot speak to the fact from recollection, any farther than as finding it entered in a book or paper, such book or paper ought to be produced, and if not evidence, the testimony of the witness amounts to nothing. *Doe v. Perkins*, 3 T. R. 749. But where a witness, on seeing his initials affixed to an entry of payment, said, "I have no recollection that I received the money; I know nothing

¹ 6 Eng. Com. Law Reps. 49. ² 3 Id. 340. ³ 3 Id. 104.

but by the book, but seeing my initials, I have no doubt that I received the money," this was held sufficient evidence. *Maugham v. Hubbard*, 8. B. and C. 14.* A witness may refresh his memory by references to entries in a book, which he did not write with his own hand, but which he examined from time to time while the events recorded were fresh in his recollection; *Burrough v. Martin*, 2 Campb. 112; but he will not be allowed to refresh his memory with a copy of a paper made by himself six months after he wrote the original, though the original is proved to be so covered with figures as to be unintelligible. *Jones v. Stroud*, 2 C. and P. 196.* However, in one case where a witness refreshed his memory from a paper not written by himself, Lord Ellenborough said, that it was sufficient if a man could positively swear that he recollected the fact, though he had totally forgotten the circumstance before he came into court; and if, upon looking at any document, he can so far refresh his memory as to recollect a circumstance, it is sufficient. *Henry v. Lee*, 2 Chitty, 124.* If the witness be blind, the paper may be read over to him. *Catt v. Howard*, 3 Stark. 4.* Where a paper is put into the hands of a witness to refresh his memory, the counsel on the other side has a right to inspect it, without being bound to read it in evidence. *Sinclair v. Stevenson*, 1 C. and P. 582.* *R. v. Ramsden*, 2 C. and P. 603.*

EFFECT OF EVIDENCE.

Under the present head will be collected the most material cases relative to the effect of judgments, verdicts, and other judicial proceedings, of instruments of state, of public books and registers, and lastly of awards.

First, with regard to the effect of judgments and verdicts in the superior courts of this country.

Effect of Judgments and Verdicts.

Effect of judgments and verdicts in the superior courts with regard to the parties.] It is a general principle that a transaction between two parties in judicial proceedings ought not to be binding upon a third; for it would be unjust to bind any person who could not be admitted to make a defence, or to examine witnesses, or to appeal from a judgment which he might think erroneous. And therefore the depositions of witnesses in another cause, in proof of a fact, the verdict of a jury finding a fact, and the judgment of the court on facts found, although evidence against the parties, and all claiming under them, are not in general to be used to the prejudice

* 15 Eng. Com. Law Reps. 147. * 12 Id. 86. * 18 Id. 273. * 14 Id. 143.
* 11 Id. 480. * 12 Id. 283.

of strangers. *Per de Grey, C. J., Duch. of Kingston's case*, 20 *How. St. Tr.* 538. In order to bind the party, he must have sued, or been sued, in the same character in both suits. Thus in an action by an executor on a bond, he will not be estopped by a judgment in an action brought by him as administrator on the same bond, but he may show the letters of administration repealed. *Robinson's case*, 5 *Rep.* 32 *b*. In considering the effect of judgments the court will look to the real parties to the suit. Thus a verdict in trespass against a person who justified as servant of J. S., was allowed to be given in evidence against the defendant, who also acted under J. S., J. S. being considered the real defendant in both causes. *Kimmersley v. Orpe*, *Dougl.* 517. But such evidence is not conclusive. *Outram v. Morewood*, 3 *East*, 366. So a verdict against one defendant is evidence in a second action against the same, and other defendants, if the latter claim under the first defendant. *Strutt v. Bovingdon*, 5 *Esp.* 58, *Gilb. Ev.* 32.

Effect of judgments and verdicts in the superior courts with regard to privies.] Privies stand in the same situation as those to whom they are privy. Thus a privy in blood, as an heir, may give in evidence a verdict for, and is bound by a verdict against his ancestor. *Locke v. Norborne*, 3 *Mod.* 141; see *Outram v. Morewood*, 3 *East*, 346. So of privies in estate. Therefore, if there be several remainders limited by the same deed, a verdict for one in remainder may be given in evidence for one next in remainder. *Pyke v. Crouch*, 1 *Ld. Raym.* 730. *B. N. P.* 232. See *Doe v. Tyler*, 6 *Bingh.* 390.* So a verdict for or against a lessee, is evidence for or against him in reversion. *Com. Dig. Ev. (A. 5)*, *Gilb. Ev.* 35, 1 *Phill. Ev.* 308; but see *B. N. P.* 232, 1 *Stark. Ev.* 192. So of privies in law; thus a verdict against an intestate, or testator, binds his representatives. *R. v. Hebden, And.* 389. In the same manner a judgment against the schoolmaster of a hospital, concerning the rights of his office, is evidence against his successor. *Travis v. Chaloner*, 3 *Guill.* 1237. Upon the same principle a judgment of ouster against a mayor was allowed to be given in evidence to prove the ouster is a *quo warranto* against a third person, admitted by him. *R. v. Hebden*, 2 *Str.* 1109, *B. N. P.* 231, 2 *Schw. N. P.* 1089, *S. C.*; but such evidence is not conclusive. *R. v. Grimes*, 5 *Burr.* 2598.

Effect of judgments or verdicts in the superior courts with regard to strangers.] There are several exceptions to the general rule, that no one shall be bound by a judgment to which he is not party or privy. In the case of customs, or tolls, verdicts, whether recent or ancient, respecting the same custom or toll, are evidence between other parties. *City of London v. Clerke, Carth.* 181. *B. N. P.* 223. So in the case of customary commoners, a verdict in an

action for or against one, is evidence for or against another claiming in the same right. *Per Lord Kenyon, Reed v. Jackson*, 1 East, 357. So a verdict with regard to a public right of way. *Id.* 355. But the verdict in such cases is not conclusive. *Biddulph v. Ather*, 2 Wils. 23. The judgment *in rem*, of a court of exclusive jurisdiction, is conclusive as to all the world, *vide post*, p. 104. Where a judgment is offered in evidence merely for the purpose of proving the fact that such a judgment has been obtained, and not with a view to prove the facts upon which the judgment was founded, it may be evidence for or against a stranger. Thus a verdict against a master, in an action for the negligence of his servant, is evidence in an action by the master against the servant, to prove the amount of damages. *Green v. New River Co.*, 4 T. R. 590.

Effect of judgments and verdicts with regard to the subject matter of the suit.] A judgment between the same parties, and upon the same cause of action, is conclusive; and if the cause of action is the same, it is immaterial that the form of action is different. Thus a verdict in trover is a bar in an action for money had and received, brought for the value of the same goods. *Hitchen v. Campbell*, 2 W. Bl. 827. So a judgment in debt is a bar in an action of assumpsit on the same contract. *Slade's case*, 4 Rep. 94. b. So a judgment in trespass, in which the right of property is determined, is a bar in trover for the same taking. *Com. Dig. Action (K. 3)*. If the party mistake his form of action, and fail on that account, the judgment in such action will not conclude him. *Ferrars v. Arden*, Cro. Eliz. 668, 2 Saund. 47, p (n). *Godson v. Smith*, 2 B. Moore, 157.* If the plaintiff omit to give any evidence of a demand which he might have recovered in a former action, he will not be precluded from giving evidence of it in a subsequent action. *Seddon v. Tutop*, 6 T. R. 607; and see *Rave v. Farmer*, 4 T. R. 146. *Thorpe v. Cooper*, 5 Bingh. 129.¹ But where the declaration in the second action is framed in such a manner that the causes of action may be the same as those in the first suit, it is incumbent on the party bringing the second action to show that they are not the same. *Lord Bagot v. Williams*, 3 B. and C. 239.²

A judgment is only evidence where it is directly upon the point in question, and is not evidence of any matter which came collaterally in question, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment. *Duch. of Kingston's case*, 20 How. St. Tr. 533. *Blackham's case*, 1 Salk. 290.

Effect of judgments and verdicts in the superior courts with regard to the manner in which they are taken advantage of.] A judg-

* 4 Eng. Com. Law Reps. 410. ¹ 15 Id. 387. ² 10 Id. 62.

ment upon the same point, between the same parties, will operate as an estoppel, if so pleaded in a second action; but if only offered in evidence, and not so pleaded, it is not conclusive. *Outram v. Morewood*, 3 East, 365, *Stafford v. Clark*, 2 Bingh. 381,⁴ 9 B. Moore, 724, *S. C. Hooper v. Hooper*, *McCl. and Y.* 509. Thus, where an action was brought for widening a water channel to the damage of the plaintiff's mill, it was held that a verdict obtained by the defendant, on a former action brought by the plaintiff for the same cause, but not pleaded as an estoppel, was not conclusive, but only evidence to go to the jury. *Vooght v. Winch*, 2 B. and A. 662.

[*Admissibility, in civil cases, of verdicts in criminal cases.*] It has been said, that a conviction in a court of criminal jurisdiction, is evidence of the same fact, coming collaterally into controversy in a court of civil jurisdiction. *B. N. P.* 245; and see *Gilb. Ev.* 30. Where the conviction has been procured on the evidence of the party who seeks to avail himself of it in a civil action, it has been decided that such conviction is inadmissible; and it seems also to be very doubtful whether it is admissible when it has been procured, not on the sole evidence of the party, or even where it has been procured entirely on the evidence of others. *Hillyard v. Grantham*, cited 2 Ves. 246. *Gibson v. Maccarty*, *Rep. temp. Hardw.* 311. *Hathaway v. Barrow*, 1 Campb. 151. *Burdon v. Browning*, 1 Taunt. 520. *Brook v. Carpenter*, 3 Bingh. 300.^o 2 *Evans's Pothier*, 313. If on an indictment for an assault the defendant pleads guilty, the record is said to be evidence in an action for damages for the same assault, like any other admission by the party. *Tr. pr. Pais*, 30, *Anon.* 1 *Phill. Ev.* 320. But the contrary has been ruled by the present Lord Chief Justice at *Nisi Prius*. 2 *Phill. Ev.* 203, 7th edit.

Effects of Sentences in the Ecclesiastical courts.

The Ecclesiastical Courts having the exclusive right of deciding directly upon the legality of marriages, the temporal courts receive the sentences of the ecclesiastical courts, upon such questions, as conclusive evidence of the fact; *Bunting's case*, 4 *Rep.* 29 a; upon the principle that the judgment of a court of exclusive jurisdiction, directly upon the point, is conclusive upon the same parties, upon the same matter coming incidentally in question in another court, for a different purpose. *Duch. of Kingston's case*, 20 *Hov. St. Tr.* 538, 540. So a sentence in a suit of jactitation of marriage, is evidence in an action in a court of common law to disprove the marriage. *Jones v. Bow*, *Carth.* 225. In the last-mentioned case such sentence was held to be conclusive evidence, but in this point the authority of that decision has been overthrown, for a sentence in a suit of jactitation has only a negative and qualified

⁴ 9 *Eng. Com. Law Reps.* 437. • 11 *Id.* 108.

effect, viz., that the party has failed in his proof, leaving it open to new proofs of the same marriage, in the same cause, and does not conclude even the court which pronounces it. *Duch. of Kingston's case*, 20 How. St. Tr. 543; and see *Blackham's case*, 1 Salk. 290, and *Harg. Law Tracts*, 451.

The Ecclesiastical Courts have also the exclusive right of deciding directly on the validity of wills of personality, and in the granting of administration. *Noel v. Wells*, 1 Lev. 235. A probate therefore is conclusive till it be repealed, and no court of common law can admit evidence to impeach it. *Allen v. Dundas*, 3 T. R. 125. See *Hargr. Law Tracts*, 459. And on this ground the payment of money to an executor, who has obtained probate of a forged will, is a discharge to the debtor of the intestate, though the probate be afterwards declared null. *Ibid.* But letters of administration are not evidence of any fact which can only be inferred from them, as the intestate's death. *Thomson v. Donaldson*, 3 Esp. 63, 20 How. St. Tr. 533. Though it cannot be shown in a court of common law that the Ecclesiastical Court has erred in granting probate, yet evidence may be given to show that the Ecclesiastical Court had no jurisdiction, as that there were no *bona notabilia* within its jurisdiction, *B. N. P.* 247, or that the supposed intestate is alive. See *Allen v. Dundas*, 4 T. R. 130. So the letters of administration may be proved to be revoked, for this is in affirmance of the proceedings of the spiritual court. *B. N. P.* 247. So it may be shown that the seal of the ordinary has been forged, for that does not impeach the judgment of the court; but it cannot be shown that the will was forged, or that a testator was *non compos mentis*, or that another person was appointed executor, *Ibid.* *Noel v. Wells*, 1 Lev. 236, for those questions are decided by the judgment of the Ecclesiastical Court.

Effect of Sentences in the Court of Admiralty.

Upon questions of prize the Court of Admiralty has exclusive jurisdiction, and therefore a sentence of condemnation in that court is conclusive, and being a proceeding *in rem* it binds all the world, *Kinnersley v. Chase*, *Park Ins.* 490, 6th Ed. And the sentence of a foreign Court of Admiralty also is, by the comity of nations, held to be conclusive upon the same question arising in this country. *Hughes v. Cornelius*, 2 Show. 232, *Bolton v. Gladstone*, 5 East, 160. But the sentence of a Court of Admiralty, sitting under a commission from a belligerent power in a neutral country, will not be recognised in our courts. *Havelock v. Rockwood*, 8 T. R. 268, *Donaldson v. Thompson*, 1 Campb. 429. The sentence is only evidence of what is positively affirmed in it, not of what is to be gathered by inference from it. *Fisher v. Ogle*, 1 Campb. 418, *Horneyar v. Lushington*, 3 Campb. 89, but see *Lothian v. Hender-*

son, 3 B. and P. 525. If the property is condemned on the ground of its not being neutral, the sentence is conclusive evidence of that fact. *Barzillay v. Lewis, Park Ins.* 469, 6th Ed. So where no special ground is stated, but the ship is condemned generally as a good and lawful prize, it is to be presumed that the sentence proceeded on the ground of the property belonging to an enemy, and the sentence will be conclusive evidence of that fact. *Saloucci v. Woodmas, Park Ins.* 471, 3 Dougl. S. C. But where is some ambiguity in the sentence of a foreign court of admiralty, so that the precise ground of the determination cannot be collected, the courts here may examine the ground on which the sentence proceeded. *Bernardi v. Motteaux, Dougl.* 574. And if the condemnation does not plainly proceed upon the ground of enemies' property, or of the ship not having complied with subsisting treaties between her own country and that of the capturing power, but on the ground of regulations arbitrarily imposed by the latter, to which neither the government of the captured ship nor the other powers of Europe have been made parties, such a condemnation shall not be admitted as conclusive against a warranty of neutrality. *Pollard v. Bell, T. R.* 444. *Baring v. Clagett, 3 B. and P.* 215; see *Bolton v. Gladstone, 5 East, 155, 2 Taunt.* 85.

Effect of Judgments in rem.

A judgment of condemnation of goods in the Court of Exchequer upon a proceeding *in rem*, is conclusive evidence as to all the world, and, therefore, after such judgment, trespass will not lie against the officer who seized the goods, to try the point of forfeiture again. *Scott v. Sherman, 2 W. Bl.* 977. But if the proceeding was *in personam* merely, as a conviction for penalties, and not *in rem*, the judgment is not evidence in any case in which the parties are different. *Hert v. M'Namara, 4 Price, 154 (n)*. So the judgment of commissioners of excise, on an information for an offence against an excise law, is conclusive, *Fuller v. Fotch, Carth.* 346, and binds a stranger. *Roberts v. Fortune, Hargr. Law Tracts, 468 (n)*. 1 *Phill. Ev.* 337; but see *Henshaw v. Pleasance, 2 W. Bl.* 1174, *contra*. See also 1 *Ridgway, Irish T. R.* 1, 2 *Evans's Pothier, 307*. It has been said that an acquittal in the Court of Exchequer, upon a seizure made for want of a permit, is conclusive evidence that the permit was regular; *Per Lord Kenyon, Cooke v. Sholl, 5 T. R.* 255. *Vin. Ab. Evid. (A. b. 22)*; but this opinion has been, with reason, questioned; for the acquittal does not, like a conviction, ascertain any precise fact, and may have proceeded merely on the ground that sufficient evidence was not produced. 1 *Phill. Ev.* 338.*

* The sentence of a competent court proceeding *in rem*, is conclusive with respect to the thing itself, and operates an absolute change of the property; by such sentence the right of the former owner is lost, and a complete title given to the person taking under it. *Williams v. Armroyd, 7 Cranch, 423*.

Effect of Proceedings in Equity.

Bill in Chancery.] It is laid down in a book of authority, that a bill in Chancery is evidence against the complainant, for the allegations of every man's bill shall be supposed true, nor shall it be supposed to be preferred by a counsel or solicitor, without the party's privity, and therefore it amounts to a confession, and admission of the truth of the fact, and if the counsel have mingled with it any fact that is not true, the party may have his action; but in order to make the bill evidence against the complainant, there must be proceedings upon it. *B. N. P.* 235. *Snow v. Phillips*, 1 *Sid.* 221. *Taylor v. Cole*, 7 *T. R.* 3 (n). *Gilb. Ev.* 49. 1 *Stark. Ev.* 286. But it is said by Lord Kenyon, that a bill in Chancery is never admitted in evidence further than to show that such a bill did exist, and that certain facts were in issue between the parties. *Doe v. Sybourn*, 7 *T. R.* 3. 1 *Phill. Ev.* 341. *Ferrers v. Shirley*, *Gilb.* 197. So in the *Banbury Peerage case*, 2 *Schw. N. P.* 714, to a question whether a bill in Chancery can ever be received in evidence, in a court of law, to prove any facts either alleged or denied in such bill, the judges answered, that generally speaking, a bill in Chancery cannot be received in evidence in a court of law to prove any fact, either alleged or denied, in such bill. But whether any possible case might be put, which would form an exception to such general rule, the judges could not undertake to say. At all events, a bill in equity cannot be received as evidence against a party not claiming, or deriving in any manner under either the plaintiff or defendant in the Chancery suit. *Ibid.* See 1 *M. and R.* 667, 7 *B. and C.* 789.

Answer.] An answer in Chancery is good evidence against the defendant, as an admission on oath, and it must all be taken together; therefore if upon exceptions taken a second answer has been put in, the defendant may insist upon having that read to explain what he swore in his first answer. *B. N. P.* 237, *Gilb. Ev.* 50. Where one party reads part of the answer of the other party in evidence, he makes the whole admissible only so far as to waive any objection as to the competency of the testimony of the party making the answer, and he does not thereby admit as evidence, facts which may happen to have been stated by way of hearsay only; *Per Chamber, J., Roe v. Ferrers*, 2 *B. and P.* 548; but this point does not appear to have been judicially decided. See *ante*, p. 34.

The answer of a guardian is no evidence against an infant, nor the answer of a trustee against a *cestui que trust*. *B. N. P.* 237. But an answer will be evidence against privies; thus an answer in a suit for tithes instituted by a vicar against the rector and others (owners of lands in the parish), in which answer the defendants

¹ 14 Eng. Com. Law Reps. 129.

declared the tithes to belong to the rector, will be evidence in an action for tithes, by a succeeding rector against owners of the same lands. *Dartmouth v. Roberts*, 16 East, 334. The answer of one defendant is not evidence against a co-defendant; *Wych v. Meal*, 3 P. Wms. 311; but after evidence has been given to connect two persons as partners, the answer of one will be evidence against the other. *Grant v. Jackson, Peake*, 203, ante p. 31. Whether the answer of a married woman can be used as evidence against her after her husband's death, has never been expressly decided. *Wrottesley v. Bendish*, 3 P. Wms. 235. See 1 Stark. Ev. 290.

Depositions.] Depositions in Chancery may be given in evidence in an action at law in the same matter, between the same parties, where the witness is dead, or cannot be found, or has fallen sick by the way. *B. N. P.* 239. *Gilb. Ev.* 60. But they are not evidence against a person who does not claim under the plaintiff or defendant in the Chancery suit. *Banbury Peerage case*, cited 1 M. and R. 667, 7 B. and C. 789. Depositions relating to a question of custom or tolls, upon which hearsay would be good evidence, ante, p. 20, may be read against a person who was no party to the former suit. *B. N. P.* 239. So a deposition taken in a cause between other parties, will be admitted to be read to contradict what the same witness swears at a trial. *B. N. P.* 240.

Decree.] A decree in Chancery may be given in evidence between the same parties, or any claiming under them. *B. N. P.* 243.

*Effect of Judgments of Foreign Courts.**

The sentence of a foreign court of competent jurisdiction, directly deciding a question, cognizable by the law of the country, seems to be conclusive here if the same question arise incidentally between the same parties, provided the sentence be conclusive by the law of the foreign country. See *Roach v. Garraan*, 1 Ves. 159. *Burrows v. Jemino*, 2 Str. 733. *Stafford v. Clark*, 2 Bingh. 380.^c Thus in covenant to indemnify the plaintiff from all debts due from the late partnership of plaintiff, defendant, and D. B., and from all suits, &c., proof of the proceedings in a foreign court in a suit there instituted against the late partners for the recovery of a partnership debt, in which suit a decree passed against them for want of answer, *per quod* a sequestration issued against the plaintiff's estate, and he was obliged to pay the debt, &c., is conclusive against the defendant, who will not be permitted to show that the proceedings were erroneous. *Tarlton v. Tarlton*, 4 M. and S.

^c 9 Eng. Com. Law Reps. 437.

* Foreign judgments are authenticated, 1, by an exemplification under the great seal; 2, by a copy proved to be a true copy; 3, by the certificate of an officer authorized by law, which certificate itself must be properly authenticated. These are the usual, and appear to be the most proper, if not the only modes of verifying foreign judgments. *Church v. Hubbard*, 2 Cranch, 187.

20. But if it appears on the face of the foreign proceedings, that the judgment is founded in injustice, as where it appears that the defendant has never been summoned, in which case the court could have no jurisdiction, the judgment will not be conclusive, and the courts here will not give effect to it. *Buchanan v. Rucker*, 9 East, 192, 1 Campb. 63; and see *Cavan v. Stewart*, 1 Stark. 525.^a In order to render the judgment of a foreign court conclusive in this country, it must appear, that it was final and conclusive in the foreign court in which it was given. *Plummer v. Woodburn*, 4 B. and C. 637.¹

It seems, that in an action of debt or assumpsit brought in this country upon a foreign judgment, such judgment is to be considered only as a *prima facie* evidence of the debt, and not conclusive; for it is not relied upon as an estoppel, but as a consideration *prima facie* sufficient to raise a promise. *Walker v. Witter*, 1 Dougl. 1. *Sinclair v. Fraser*, 1 Dougl. 5 (n), 20 St. Tr. 469, S. C. *Per Eyre*, C. J. *Phillips v. Hunter*, 2 H. Bl. 410. *Per Ld. Mansfield*, *Herbert v. Cook*, Willes, 37 (n). 3 Dougl. 101, S. C. *Arnott v. Redfern*, 3 Bingh. 357,² 1 Phill. Ev. 332; but see 1 Stark. Ev. 208, 2 Evans's Poth. 311. A judgment in one of the superior courts in Ireland, since the union, is not a record in England, and assumpsit lies upon such judgment here. *Harris v. Saunders*, 4 B. and C. 411.¹ So an action will lie upon the decree of a colonial court of equity, for the balance of an account between partners. *Henley v. Soper*, 8 B. and C. 16,² 2 M. and R. 153, S. C.

The certificate of a vice-consul has been compared to a foreign judgment, but it will not be admitted as evidence of the facts stated in it. Thus the certificate of a British vice-consul in a foreign country is not admissible to prove the amount of a sale, though by the law of that country he was constituted general agent for all absent owners of goods, and was authorised and compelled to make the sale in question. *Waldron v. Combe*, 3 Taunt. 162.

Effect of Judgments of Inferior Courts.

It seems, upon principle, that the judgment of an inferior court, whether of record or not of record, is conclusive between the same parties upon the same subject matter. See *Moses v. Macferlan*, 2 Burr. 1009, *Galbraith v. Neville*, Dougl. 5 (n), 2 Evans's Poth. 303, *Briscoe v. Stephens*, 2 Bingh. 216,³ 1 Stark. Ev. 208. Though it has been said, that inferior courts, not of record, have not the privilege of not having their judgments controverted. *Per Ld. Mansfield*, *Walker v. Witter*, Dougl. 3. So Lord Ellenborough ruled, that the judgment in the Lord Mayor's Court was *prima facie* evidence that the debt arose within the City; but that being the record of an inferior court the defendant might prove the contrary. *Huxham v. Smith*, 2 Campb. 19. So Abbott, C. J., ruled, that the

^a 2 Eng. Com. Law Reps. 496. ¹ 10 Id. 424. ² 13 Id. 1. ³ 10 Id. 373.

² 15 Id. 147. ³ 9 Id. 387.

judgment of the county court was not conclusive. *Barnes v. Winklar*, 2 C. and P. 345.* So it has been held that the judgment of an inferior court may be avoided, by proof that the cause of action did not arise within the jurisdiction of the court. *Herbert v. Cooke*, 3 Doug. 101, *Willes*, 36 (n), *S. C. Briscoe v. Stephens*, 2 Bingh. 213.†

Where a cause is removed from an inferior court, after a judgment by default, that judgment is not evidence against the defendant in the superior court. *Bottings v. Firby*, 9 B. and C. 762.‡

Effect of Inquisitions, &c.

Effect of coroner's inquest.] Although an inquisition of *felo de se*, taken before the coroner *super visum corporis*, was formerly considered conclusive evidence of the fact against the executors or administrators of the deceased; 3 *Inst.* 55; yet it is now held, that such inquisition may be removed into the King's Bench and traversed. 1 *Saund.* 362 (n). The finding of *fugam fecit* is, however, still held (though not, as it seems, upon principle) to be conclusive. *Ibid.*

Effect of an inquisition of lunacy, &c.] An inquisition of lunacy is evidence against third persons, though not conclusive. *Sergeason v. Sealey*, 2 Atk. 412, *Faulder v. Silk*, 3 Campb. 126.

So an inquisition under a commission from the Court of Exchequer, in the reign of Elizabeth, to inquire whether a prior or the crown, after the dissolution of the priory, was seized of certain lands, was held to be admissible, but not conclusive evidence of the facts stated in the return. *Tooker v. Duke of Beaufort*, 1 Burr. 146. So the surveys of the church and crown lands taken by commissioners, under the authority of parliament, during the commonwealth, are admissible in evidence; and the originals being destroyed in the fire of London, copies of them from unsuspected repositories may be received. *Underhill v. Durham*, 2 Gwill. 542. *Bullen v. Michel*, 4 Dow, 325, *Rowe v. Ireland*, 11 East, 284.

The *valor beneficiorum*, or Pope Nicholas's taxation, is a document of the same nature, and is admissible to prove the rate and value at which the persons employed in that taxation thought fit, at that time, to estimate ecclesiastical benefices. *Bullen v. Mitchell*, 2 Price, 477. A new *valor beneficiorum* was made, 26 Hen. VIII., by virtue of commissions under the great seal, and the surveys under these commissions are admissible to prove the value of the first fruits and tenths of ecclesiastical promotions at that period, though they are not conclusive on such questions. *Per Richards*, C. B. *Drake v. Smyth*, 5 Price, 377. *Michel v. Bullen*, 4 Dow, 324.

* 12 Eng. Com. Law Reps. 161. † 9 Id. 387. ‡ 17 Id. 492.

Domesday-book, being a work compiled by the authority of the government, is admissible to prove the tenure of the lands then surveyed; and where a question arises whether a manor is ancient demesne, the trial is by inspection of Domesday-book. *Gilb. Ev.* 76.

An inquisition by a sheriff's jury to ascertain the value of property, for the information of the sheriff, is not conclusive, or, as it seems, admissible evidence against the sheriff; *Luckow v. Eamer*, 2 H. Bl. 437; nor is it evidence in his favour; *Glossop v. Pole*, 3 M. and S. 175; unless, perhaps, if the question were whether the sheriff has acted maliciously. *Per Ld. Ellenborough, id.* 177.

Effect of Convictions, Sentences, &c.

It is a general rule, that where justices of the peace have an authority given to them by act of parliament, and they appear to have acted within the jurisdiction so given, and to have done all that they are required by the act to do in order to originate their jurisdiction, a conviction drawn up in due form, and remaining in force, is a protection in any action brought against them for the act so done. *Per Abbott, C. J. Basten v. Carew*, 3 B. and C. 653.* Therefore, where in trespass against two magistrates for giving the plaintiff's landlord possession of a farm as a deserted farm, the defendants produced in evidence a record of their proceedings, under stat. 11 Geo. II. c. 19, s. 16, which set forth all such circumstances as were necessary to give them jurisdiction, and by which it appeared, that they had pursued the directions of the statute, it was held that this record was not traversable, and was a conclusive answer to the action. *Ibid.* So in trespass against magistrates for taking and detaining a vessel, a conviction by them under the bum-boat act, is conclusive evidence that the vessel in question is a boat within the meaning of the act, and properly condemned. *Brittain v. Kinaird*, 1 B. and B. 432;* and see *Wickes v. Clutterbuck*, 2 Bingham 436;* *Rogers v. Jones*, 3 B. and C. 409.* *Fawcett v. Fowles*, 7 B. and C. 394.*

Upon the same principle which makes a conviction conclusive, it has been held, that a certificate from commissioners under the act for settling the debts of the army, stating the sum due from the defendant to the plaintiff, is conclusive in an action brought to recover the money. *Moody v. Thurston*, 1 Str. 481. See *Att. Gen. v. Davison*, 1 M.C. and Y. 160.

So the sentence of expulsion of a member of a college by the master and fellows, is conclusive evidence of that fact, and cannot be impeached in a court of law. *R. v. Grundon, Cowp.* 315. So a sentence of deprivation by a visitor of a college, is in the same manner conclusive. *Phillips v. Bury*, 1 Ld. Raym. 5; 2 T. R. 346,

* 10 Eng. Com. Law Reps. 211. * 5 Id. 137. * 9 Id. 490. * 10 Id. 134. .
* 14 Id. 59.

S. C. ; see *Harg. Law Tracts*, 465. So also in ejectment against a schoolmaster who had been removed by sentence of the trustees of the school (such power being vested in them) for misbehaviour, it was held that it was not necessary for the lessors of the plaintiff to prove the grounds of the sentence, and that it was not competent for the defendant to disprove them. *Doe v. Haddon*, 3 Doug. 310.

Effect of Court Rolls.

Court rolls, whether of the court baron or customary court, are evidence between the lord of the manor and his tenants or copyholders, *B. N. P.* 247. 1 *Phill. Ev.* 397, and ancient writings not properly court rolls, nor signed by any of the tenants, but found among the rolls, and delivered down from steward to steward, purporting to have been made *assensu omnium tenentium*, have been admitted as evidence to prove the course of descent within a manor. *Denn v. Spray*, 1 *T. R.* 466. So an entry on the court rolls of a manor, stating the mode of descent of lands in the manor, is evidence of such mode, though no instance of any person having taken according to it be proved. *Roe v. Parker*, 5 *T. R.* 26; and see *Doe v. Askeu*, 10 *East*, 520. So in an action by a copyholder against the freeholder of a manor, certain parchment writings preserved amongst the muniments of a manor, dated in 1698 and 1717, purporting to be signed by certain copyholders of the manor, stating an unlimited right of common in the copyholders, were held to be evidence of the reputation of the manor at the time, as to a prescriptive right of common set up by the defendant. *Chapman v. Cowlan*, 13 *East*, 10.

Effect of Bishop's Certificate.

In certain cases involving matter of law as well as matter of fact, see *Omichund v. Baker*, *Willes*, 549, the certificate of the bishop is conclusive evidence. Thus, where issue is joined upon the record in certain real writs, upon the legality of a marriage, or its immediate consequence "general bastardy," or in like manner in some other particular instances lying peculiarly within the knowledge of the spiritual court, as profession, deprivation, and some others, in these cases upon the issue so joined, the mode of trying the question is by reference to the ordinary, and his certificate when returned, received and entered upon the record, in the temporal courts, is a perpetual and conclusive evidence against all the world on that point. *Per de Gray, C. J., Duch. of Kingston's case*, 20 *How. St. Tr.* 339; and see *Com. Dig. Certificate*. In bastardy the trial by the certificate of the bishop takes place at this day only in the case of a general allegation of bastardy, and that only so long as the party is living, and not only living, but a party

in the suit, and not only a party to the suit but adult; in matrimony, in the two cases only of dower and appeal. *Per* *Ld. Loughborough*. *Ilderton v. Ilderton*, 2 H. Bl. 156.

Effect of State Documents, &c.

Acts of Parliament.] The preamble of a public act of parliament reciting the existence of certain outrages, is evidence to prove that fact, because in judgment of law every subject is privy to the making of them. *R. v. Sutton*, 4 M. and S. 532.

Proclamations.] The King's proclamation being an act of state, of which all ought to take notice, *Per Treby*, *C. J. Wells v. Williams*, 1 Ld. Raym. 283, is evidence to prove a fact recited in it, viz. that certain outrages had been committed in different parts of certain counties. *R. v. Sutton*, 4 M. and S. 532.

Journals of Parliament.] The Journal of the House of Lords containing an address of the Lords to the King, and the King's answer, in which certain differences are stated to exist between the King of England and the King of Spain, is admissible to prove the fact of such differences existing. *R. v. Franklin*, 17 How. St. Tr. 637. *R. v. Holt*, 5 T. R. 445. But the resolutions of either house of Parliament are not evidence of facts therein stated; thus the resolution of the House of Commons, stating the existence of the popish plot, was held to be no evidence of that fact. *Oates's case*, 10 How. St. Tr. 1165, 1167.

Gazette.] The gazette is evidence of all acts of state there included; as where it states that certain addresses have been presented to the King, it is evidence to prove that fact, *R. v. Holt*, 5 T. R. 436. So proclamations there printed, may be proved by production of the gazette. *Ibid.* 443, *Attorn. Gen. v. Theakstone*, 8 Price, 89. But the gazette is not evidence of matters therein contained, which have no reference to acts of state, as a grant by the King to a subject of a tract of land, or of a presentation; See *R. v. Holt*, 5 T. R. 443; or of the appointment of an officer to a commission in the army. *Kirwan v. Cockburn*, 5 Esp. 233; *R. v. Gardner*, 2 Campb. 513. It is usual to insert advertisements of the dissolution of partnerships in the gazette, but it seems that unless the party to be affected by the notice be proved to be in the habit of reading the gazette, it will not be evidence of such notice. *Graham v. Hope*, Peake, 154; *Godfrey v. Macauley*, *ibid.* 155 (n); but see *S. C.* 1 Esp. 371, differently reported; and see *Newsome v. Coles*, 2 Campb. 617; and *Gorham v. Thompson*, Peake, 42. Lord Ellenborough in one case admitted the gazette as evidence, but observed, that unless it were proved that the party were in the

habit of reading it, the evidence would be of little avail. *Leeson v. Holt*, 1 Stark. 186; ^v see also *Munn v. Baker*, 2 Stark. 255.² It seems not to be necessary, in giving the gazette in evidence, to prove that it was bought of the gazette printer, or where it came from. *Forsyth's case*, Russ. and Ry. C. C. R. 277.

A paper from the secretary of state's office, transmitted by the British ambassador at a foreign court, and purporting to be a declaration of war by the government of that country, against another foreign state, is admissible for the purpose of showing the precise period of the commencement of the war. *Theluson v. Costing*, 4 Esp. 266. The articles of war printed by the king's printer, are evidence of such articles, *R. v. Withers*, cited 5 T. R. 446, of which it seems the court will take judicial notice. *Bradley v. Arthur*, 4 B. and C. 304.⁷

Effect of Public Books, &c.

Public books and documents are, in many instances, evidence of the facts there recorded. Thus the register of the Navy Office, with proof of the usage to return all persons dead, is evidence to prove the death of a sailor. *B. N. P.* 249. The book at Lloyd's stating the capture of a ship is evidence of such capture; but it is not evidence of notice of the loss, unless to a person who is a subscriber at Lloyd's, and in the habit of examining the books there. *Abel v. Potts*, 3 Esp. 242. The log-book of a man-of-war is evidence to prove the time of that vessel sailing as convoy, in an action on the insurance of another vessel. *D'Israeli v. Jowett*, 1 Esp. 427. The bank books are evidence to prove a transfer of stock. *Breton v. Cope*, Peake, 30. So the book from the master's office in K. B. to prove a person an attorney of that court, without production of the roll. *R. v. Crossley*, 2 Esp. 524. So the poll books at an election. *Mead v. Robinson*, Willes, 424. So the books of the King's Bench and Fleet prisons, are admissible to prove the dates of the commitment and discharge of prisoners; *R. v. Aickles, Leach*, C. L. 436; but not the cause of commitment, of which the commitment itself is the best evidence. *Salte v. Thomas*, 3 B. and P. 188. The copy of an official paper, containing the number of passengers on board a vessel, made in pursuance of an act of parliament by the captain, and deposited at the India House, is admissible to show the number and description of the persons on board the vessels. *Richardson v. Mellish*, R. and M. 66. 2 Bingham, 229.⁸ S. C. Excise books, transcribed from the master's specimen paper, are evidence against him without calling the officers who have transcribed them, as it is said *ex necessitate rei*. *R. v. Grimwood*, 1 Price, 369. Entries in the books of the clerk of the peace, of deputations many years since granted to gamekeepers by the owner of a manor, are evidence to show that the party there

^v 2 Eng. Com. Law Reps. 349. ² 3 Id. 339. ⁷ 10 Id. 340. ⁸ 9 Id. 391.

mentioned exercised the right of appointing gamekeepers by applying to the clerk of the peace to get certificates, without production of the deputation themselves. *Hunt v. Andrews*, 3 B. and A. 341; see *Rushworth v. Craven*, 1 M.C. and Y. 417. Returns of sales of corn under 1 and 2 Geo. IV. c. 87, are not conclusive evidence to show the parties to whom the corn was delivered. *Woodley v. Brown*, 2 Bingh. 527. An entry in a vestry book, stating that A. was duly elected treasurer of the parish, at a vestry duly held in pursuance of notice, is evidence of such election; *R. v. Martin*, 2 Campb. 100; and a wardmote book, to prove the election of a constable in the city of London. *Underhill v. Witts*, 3 Esp. 56. So in an action for disturbing the plaintiff in the enjoyment of a pew, claimed in right of his message, an old entry in the vestry book signed by the churchwardens, stating repairs of the pew by a former owner of the message (under whom the plaintiff claims), in consideration of his using it, is evidence to prove the plaintiff's title, for it is made by the churchwardens on a subject within the scope of their official authority. *Price v. Littlewood*, 2 Campb. 288. By stat. 17 Geo. II. c. 38, s. 14, true copies of all rates and assessments made for the relief of the poor are to be entered in a book provided for that purpose, by the churchwardens and overseers of every parish; and by stat. 42 Geo. III. c. 46, the particulars of parish indentures are directed to be entered in a book, which book shall be deemed sufficient evidence in courts of law of the existence and particulars of such indentures, in case it shall be proved that the originals are lost or destroyed. Corporation books are evidence between members and the corporation, but they are not evidence in favour of the corporation against a stranger: *Mayor of London v. Mayor of Lynn*, 1 H. Bl. 214 (n). *Marriage v. Lawrence*, 3 B. and A. 142; unless the entry be of a public nature. *Per Abbott, C. J.*, *ibid.* *R. v. Mothersell*, 1 Str. 93. In an action by a corporation for tolls, entries in their own books are not admissible for them. *Brett v. Beales*, 1. M. and M. 429. Rolls or ancient books, in the herald's office, are evidence to prove a pedigree, but an extract of a pedigree, proved to be taken out of records is not, because such extract is not the best evidence, as a copy of such records might be had. *B. N. P.* 248. *King v. Forster*, *Sir T. Jones*, 224. The herald's visitation books of counties are also evidence on a question of pedigree. *Pitton v. Walter*, 1 Str. 162; see *Vin. Ab. Ev.* (A. b. 39.) A general history may be given in evidence to prove a matter relating to the kingdom in general; *B. N. P.* 248. *Vin. Ab. Ev.* (A. b. 46); thus chronicles have been admitted to prove, that at a certain period King Philip had not assumed the style given him in a deed. *Neale v. Fay*, cited 1 Salk. 282. So Speed's Chronicle was admitted as evidence of the death of Edward the Second's queen.

Brounker v. Atkins, Skin. 14. But a general history is not evidence to prove a particular custom. *B. N. P.* 248. Thus Camden's Britannia was held to be no evidence on an issue whether, by the custom of Droitwich, salt pits could be sunk in any part of the town. *Stainer v. Burgesses of Droitwich*, 1 *Salk.* 282. By the same principle under which entries in public books are admitted to prove the facts there stated, it has been held that the post-office marks, in town or country, proved to be such, are evidence that the letters, on which they are impressed, were in the office to which those marks belong, at the dates those marks specify. *Plumer's case, Russ. and Ry., C. C. R.* 264; and see *Fletcher v. Braddyll*, 3 *Stark.* 64.⁴ *Archangelo v. Thompson*, 2 *Campb.* 623. *Cotton v. James*, 1 *M. and M.* 276.

An almanack is good evidence to prove that a particular day was Sunday. *Page v. Faucet, Cro. Eliz.* 227.

Effect of Public Registers.

The registers of christenings, marriages, and burials, preserved in churches, or copies of them, are good evidence. *B. N. P.* 247. Where it appeared, that the practice was to make entries in the general parish register once in three months, out of a day-book, in which the entries were made immediately after the christening or on the same morning, and in the day-book, after a particular entry, the letters B. B. (signifying base born) were inserted, which were omitted in the register, it was held that evidence of the day-book could not be received, for that there could not be two parish registers. *May v. May*, 2 *Str.* 1073. The register is no evidence of the identity of the parties. *Birt v. Barlow, Dougl.* 162; *ante*, p. 50. The books of the Fleet prison are not, as it seems, evidence to prove a marriage, for they are not made by public authority. *Rejected by Ld. Kenyon, Read v. Passer, Peake*, 231. 1 *Esp.* 213, *S. C.* By *de Grey, C. J. Howard v. Burtonwood, Peake*, 233 (n). By *Lord Hardwicke and Lee, C. J. ibid.* By *Le Blanc, J. Cooke v. Lloyd, Peake Ev. Appz.* 78. By *Burrough, J. Doe v. Passingham, MS. Shrews. Sum. Ass.* 1826. Said to have been admitted by *Heath, J. Doe, dem. Passingham v. Lloyd, Shrews. Sum. Ass.* 1794, *Peake*, 231; and see *Doe v. Madoz*, 1 *Esp.* 197. *Lloyd v. Passingham*, 16 *Ves.* 49. It seems, however, that declarations by the parties, that they have been married at the Fleet, are evidence of a marriage. *Lawrence v. Dixon, Peake*, 136. *Reed v. Passer, id.* 231. The copy of a register of a foreign chapel is not admissible in our courts to prove a marriage abroad; *Leader v. Barry*, 1 *Esp.* 353; nor of a dissenting chapel, since it is not a public document. *Newham v. Raithby*, 1 *Phillimore*, 315.* So a copy of a register of Baptism kept in the island of Guernsey, is not admissible. *Huet v. Le Mesurier*, 1 *Cox's Ca.* 275.

* 14 Eng. Com. Law Reps. 164. • 1 Eng. Eccles. Reps. 90.

An entry in a register of baptism, as to the time of a child's birth, is not evidence of the age. *Wißen v. Law*, 3 Stark. 63.^c *R. v. Clapham*, 4 C. and P. 29.^e Nor is the register of the christening of a child in a particular parish evidence, when unaccompanied by other circumstances, that the child was born in that parish. *R. v. North Petherton*, 5 B. and C. 508.^a An entry, by a minister, of a baptism which took place before he became minister, and of which he received information from the parish clerk, is not admissible, nor is the private memorandum of the fact made by the clerk who was present at the baptism. *Doe v. Bray*, 8 B. and C. 813.¹ It seems that a bishop's register is evidence of the facts stated in it. *Arnold v. Bp. of Bath and Wells*, 5 Bingh. 316.^h

Effect of Awards.

An award regularly made by an arbitrator to whom matters in difference are referred, is conclusive in an action at law on the parties to the reference, upon all matters inquired into within the submission. 1 *Phill. Ev.* 360; and see *Campbell v. Twenlow*, 1 Price, 81. *Dunn v. Murray*, 9 B. and C. 780.¹ Thus where in an action of ejectment it appeared that the lessor of the plaintiff and the defendant had before referred their right to the land to an arbitrator, who had awarded in favour of the lessor, it was held, that the award concluded the defendant from disputing the lessor's title. *Doe v. Rosser*, 3 East, 11; see *Chamb. Landl. and Ten.* 267. But where on a reference by landlord and tenant, the arbitrator awarded, that a stack of hay left upon the premises by the tenant, should be delivered up by him to the landlord, upon the tenant being paid a certain sum, it was held, that the property in the hay did not pass to the landlord, on his tender of the money, by mere force of the award, against the consent of the tenant, who refused to accept the money, or deliver up the hay. *Hunter v. Rice*, 15 East, 100. Where the commissioners under an inclosure act were directed to make an award respecting the boundaries of a parish, and to advertise a description of the boundaries so fixed, and the boundaries so fixed were to be inserted in their award, and to be binding, final and conclusive, but the boundaries mentioned in the award varied from those which had been advertised, it was held, that the commissioners not having pursued their authority, their award was not binding as to the boundaries. *R. v. Washbrook*, 4 B. and C. 732.^a An award made on a reference of all matters in difference between the parties, will not be a bar with regard to any demand which was not in difference between them at the time of the submission, nor referred by them to the arbitrators. *Ravee v. Farmer*, 4 T. R. 146. *Smith v. Johnson*, 15 East, 213. See *Thorpe v. Cooper*, 5 Bingh. 129.^a

Where no arbitration bonds had been entered into, but the arbi-

^c 14 Eng. Com. Law Reps. 153. ^e 19 Id. 260. ^a 11 Id. 290. ¹ 15 Id. 339.

^h 15 Id. 459. ¹ 17 Id. 498. ^a 10 Id. 451. ^a 15 Id. 387.

trators made an award, Eyre, C. J., admitted the award as evidence under the account stated; *Keen v. Batshore*, 1 *Esp.* 194; and in assumpsit on a policy of insurance, Lord Kenyon admitted evidence that the defendant had agreed to be bound by an award to which other persons were parties, and that the award was in favour of the plaintiff. *Kingston v. Phelps, Peake*, 227.

As to the effect of presumptive evidence, hearsay, and admissions, see those titles respectively.

STAMPS.

Effect of want of Stamp.] An instrument requiring a stamp cannot be produced in evidence without being stamped, and if parties agree by parol to be bound by the same terms as those contained in a written instrument, the latter cannot be given in evidence unless properly stamped. *Turner v. Power*, 7 *B. and C.* 625.* See *Drant v. Brown*, 3 *B. and C.* 665.† Where an unstamped instrument in writing has been lost, *R. v. Castlemorton*, 3 *B. and A.* 588,‡ or destroyed even by the party who objects to the want of the stamp, *Rippener v. Wright*, 2 *B. and A.* 478, parol evidence of the contents is inadmissible. But in some cases, in which an instrument has been lost, which is not proved to have been properly stamped, that fact may be presumed, as where an indenture of apprenticeship, executed thirty years before, was lost, it was presumed to have been properly stamped, though an officer from the stamp-office proved that it did not appear that any such indenture had been stamped. *R. v. Long Buckley*, 7 *East*, 45. And where a party refuses to produce an agreement after notice, it will be presumed as against him to be properly stamped. *Crisp v. Anderson*, 1 *Stark.* 35.† Where the transaction is capable of being legally proved by other evidence than that of the instrument which ought to bear a stamp, such evidence may be resorted to. Thus, where a promissory note appears to be improperly stamped, the plaintiff may resort to the original consideration. *Farr v. Price*, 1 *East*, 58. *Tyte v. Jones*, *id.* (n). So, though an unstamped receipt is no evidence of payment, the fact of payment may be proved by a witness who was present. *Rambert v. Cohen*, 4 *Esp.* 213. So where an action is brought upon an instrument which ought to be stamped, and the form of the pleading is such, that at the trial it was not necessary to produce the instrument, a court of law will not examine whether the instrument is legally available with reference to the stamp laws. *Per Lord Eldon, Huddleston v. Briscoe*, 11 *Ves.* 596.

* 14 *Eng. Com. Law Reps.* 104. † 10 *Id.* 211. ‡ 5 *Id.* 387. § 2 *Id.* 283.

Thynne v. Protheroe, 2 M. and S. 353. If a plaintiff succeeds in making out a case of implied or oral contract, and it does not appear on the cross-examination of his witnesses that there was any contract in writing, the defendant will not be allowed to give an unstamped written contract in evidence for the purpose of nonsuiting the plaintiff. *Fielder v. Ray*, 6 Bingh. 332; and see *Reed v. Deere*, 7 B. and C. 256; *R. v. Inhab. of Rawden*, 8 B. and C. 708. A party who executes the counterpart of a deed properly stamped cannot object to its admissibility in evidence on the ground that the original is not properly stamped. *Paul v. Meek*, 2 Y. and J. 116, ante p. 2.

Unstamped instrument, when evidence for collateral purposes.] In many cases an instrument not legally stamped is admissible to prove a collateral fact. Thus, in an action of debt for bribery at an election, an unstamped promissory note payable to the defendant, which the witness said he had given for the repayment of money received by him as a voter, from the defendant, is evidence to corroborate the testimony of the witness. *Dover v. Maestaer*, 5 Esp. 92. So to refresh a witness's memory, ante p. 98. So an unstamped promissory note may be given in evidence to establish fraud, by showing that it was written by the maker in a state of intoxication. *Gregory v. Fraser*, 3 Campb. 454. And the court may inspect an unstamped writing for the purpose of ascertaining whether its contents preclude the admission of parol evidence. *R. v. Pendleton*, 15 East, 440. Where a party deposed upon two written agreements, by the second of which variations were made in the first, and there were also counts upon each separately, and it appeared when the instruments were produced in evidence by the plaintiff that the first only was stamped, it was held that the second could not be read in evidence to support the plaintiff's case, but might be looked at by the court in order to ascertain whether the first was altered by it, and that therefore the plaintiff could not exclude the second agreement, and proceed upon the counts setting out the first only. *Reed v. Deere*, 7 B. and C. 261. But where in an action against an acceptor it appeared that on the bill becoming due his name had been erased and another bill (unstamped) drawn on the back of the first, it was held that the unstamped bill could not be submitted to the jury for the purpose of drawing the conclusion that the first bill had been cancelled. *Sweeting v. Halse*, 9 B. and C. 365; and see *Sutton v. Toomer*, 7 B. and C. 416.*

Several stamps and several contracts with one stamp.] Where the subject matter of the instrument is joint, though several persons are interested in it, only one stamp is requisite. Thus, an as-

* 19 Eng. Com. Law Reps. 94. * 14 Id. 41. * 15 Id. 329.

* 17 Id. 394. * 14 Id. 66.

signment of the prize-money of several seamen on board a privateer, payable out of one fund, requires only one stamp. *Baker v. Jardine*, 13 East, 235 (n). So an agreement by several for a subscription for one common fund. *Davis v. Williams*, 13 East, 232. So an agreement of reference by all the underwriters on one policy. *Goodson v. Forbes*, 6 Taunt. 171.² So a bond by several obligors, in a penalty conditioned for the performance of certain acts, by each and every of them. *Bowen v. Ashley*, 1 N. R. 274; 6 Taunt. 175;⁷ and see *Stead v. Liddard*, 1 Bingh. 196.⁷ *Boase v. Jackson*, 3 B. and B. 185.⁸ And where the members of a mutual insurance club all executed the same power of attorney, severally authorizing the persons therein named to sign the club policies for them, it was held to require only one stamp. *Allen v. Morrison*, 8 B. and C. 565.⁸

Where a paper contains several contracts, and consequently requires several stamps, but only one is impressed upon it, that stamp applies to the contract on which it is impressed. *Powell v. Edmunds*, 12 East, 6. And where an instrument contains a contract of demise general in its terms but several in its operation with respect to the different tenants who sign, it is matter of evidence to which contract the stamp applies, and the juxta-position of the stamp is to be regarded. *Doe v. Day*, 13 East, 241. Where the several admissions of five corporators as freemen were written on the same paper with only one stamp, such stamp was held to apply to the first admission only, and the others could not be read. *R. v. Reeks*, 2 Ld. Raym. 1445; and see *Perry v. Bouchier*, 4 Campb. 80. *Waddington v. Francis*, 5 Esp. 182.

Proper denomination.] By stat. 43 Geo. III. c. 127, s. 6, if the stamp is of a proper denomination it shall not be ineffectual from its being of a greater value than the stamp acts require, and by stat. 55 Geo. III. c. 184, s. 10, all instruments for, or upon which any stamp or stamps shall have been used, of an improper denomination, or rate of duty, but of equal or greater value, in the whole, with or than the stamp or stamps which ought regularly to have been used thereon, shall be deemed valid and effectual in law, except in cases where the stamp or stamps, used in such instruments, shall have been specifically appropriated to any other instrument by having its name on the face thereof.

If an instrument bear a proper stamp when produced at the trial it is sufficient, though it was not stamped when it was executed, provided the commissioners of stamps are not expressly prohibited from subsequently affixing a stamp. *R. v. Bishop of Chester*, 1 Str. 624; and see *Rogers v. James*, 7 Taunt. 147.⁹ But with regard to an instrument to which a stamp cannot be subsequently affixed, an inquiry as to the time when the stamp was put on is ad-

² 1 Eng. Com. Law Reps. 348. ⁷ 8 Id. 294. ⁸ 7 Id. 403.

⁸ 15 Id. 298. ⁹ 2 Id. 52.

missible. *Green v. Davies*, 4 B. and C. 241 ;* but see *Wright v. Riley, Peake*, 173.

When an instrument has been stamped on payment of a penalty it is admissible, though the receipt has been erased, provided it be proved that such receipt was once indorsed. It is not necessary to prove the commissioners' signature to the receipt. *Apothecaries' Company v. Fernihough*, 2 C. and P. 439.⁴

Administration, Letters of.

Where an administrator is bound to prove his title at the trial, and produces letters of administration stamped for a less sum than that which he seeks to recover in the action, it is ground of nonsuit. *Hunt v. Stevens*, 3 Taunt. 113. On payment of the full duty, such letters may be restamped with the proper stamp. 55 Geo. III. c. 184, s. 41. But where an administrator is not bound to prove his title, as where he sues on promises to his intestate, and non assumpsit is pleaded, the defendant cannot insist on the plaintiff proving his title, by producing the letters of administration, and if produced, cannot object that they are not properly stamped. *Thynne v. Protheroe*, 1 M. and S. 553.

Agreements.

By 55 Geo. III. c. 184, *Sched.* an agreement, or any minute, or memorandum of an agreement, made in England, under hand only, or made in Scotland, without any clause of registration, and not otherwise charged in that schedule to that act, nor expressly exempted from all stamp duty, where the matter thereof shall be of the value of 20*l.* or upwards, whether the same shall be only evidence of a contract, or obligatory upon the parties, from its being a written instrument, together with every schedule, receipt, or other matter put or indorsed thereon, or annexed thereto, shall bear a 1*l.* stamp. See similar provisions in 44 Geo. III. c. 98, 48 Geo. III. c. 149, upon which many of the cases cited below arose.

The following are the exemptions in the schedule :—

First Exemption. Label, slip, or memorandum, containing the heads of insurances to be made by the corporations of the Royal Exchange Assurance, or London Assurance, or by the corporations of the Royal Exchange Assurance of houses and goods from fire, and London Assurance of houses and goods from fire.

Second Exemption. Memorandum or agreement for granting a lease or tack, at rack rent, of any messuage, land, or tenement, under the yearly rent of 5*l.* An agreement for a building lease, though under 5*l.* per annum, is not within this exemption, the interest being a beneficial one. *Doe v. Boulcot*, 2 Esp. 595.

Third Exemption. Memorandum or agreement for the hire of

any labourer, artificer, manufacturer, or menial servant. The assignment of an apprentice is not within this exemption. *R. v. St. Paul's, Bedford*, 6 T. R. 452.

Fourth Exemption. Memorandum, letter, or agreement made for or relating to the sale of any goods, wares, or merchandizes.

Cases within the Fourth Exemption. An undertaking to guarantee the payment of goods, to be furnished to third persons. *Warrington v. Furber*, 8 East, 242. An agreement by A. to take half of certain goods bought by B. on their joint account, and to furnish B. with half the amount in time for payment. *Venning v. Leckie*, 13 East, 7. An agreement to cancel a former agreement relative to the sale of goods, and for the future sale of goods, upon different terms. *Whitworth v. Crockett*, 2 Stark. 431.* An agreement for the sale of rape oil, not yet expressed from the seed. *Wilks v. Atkinson*, 6 Taunt. 11;† but see *Buxton v. Bedall*, 3 East, 303. An agreement for the sale of chimney-pieces, the vendor "to finish them in a tradesman-like manner." *Hughes v. Breeds*, 2 Carr. and P. 159.‡ A receipt for the price of a horse containing a warranty of soundness. *Skrine v. Elmore*, 2 Campb. 407. An agreement for a crop growing in a close, to be removed immediately, and conferring no interest in the land. *Parker v. Staniland*, 11 East, 362. *Warwick v. Bruce*, 2 M. and S. 205. *Evans v. Roberts*, 5 B. and C. 829.⁴ An agreement for the purchase of timber, though the trees are growing. *Smith v. Surman*, 9 B. and C. 561.⁵ An agreement to supply a house with water. *West Middlesex W. W. v. Tenver-kropp*, 1 M. and M. 408. Some of the above cases were decided on the 4th sec. of the statute of frauds, but they apply as authorities on the stamp act also.

Cases not within the Fourth Exemption. An agreement *in fieri* for the making of goods, and for work and labour to be done, as for putting up certain machines. *Buxton v. Bedall*, 3 East, 303; but see *Wilkes v. Atkinson*, 6 Taunt. 11.⁶ *Hughes v. Breeds*, 2 Carr. and P. 159, *supra*; see also *Waddington v. Bristow*, 2 B. and P. 455. An agreement by a principal to provide for certain bills drawn upon his factor, if certain goods, then either in the factor's possession or about to be placed there, should remain unsold at the time of the bills falling due; for the exemption is confined to instruments whereof the sale of goods is the primary object. *Smith v. Cator*, 2 B. and A. 778. An agreement for the sale of growing crops, conferring an interest in the land. *Crosby v. Wadsworth*, 6 East, 602 (case on the 4th sec. of the stat. of frauds). *Waddington v. Bristow*, 2 B. and P. 453. *Emmerson v. Heelis*, 2 Taunt. 38 (case on the 4th sec. of the stat. of frauds). So a sale of growing underwood to be cut by the purchaser, has been held to confer an interest in land under the 4th section of the statute of frauds. *Scorell v. Boxall*, 1 Y. and J. 368. A contract, under seal, for the sale of goods. *Per Bayley, J., Clayton v. Burtenshaw*, 5 B. and C. 45.⁷

* 3 Eng. Com. Law Reps. 417. † 1 Id. 292. ‡ 12 Id. 71. ⁴ 12 Id. 377.

⁵ 17 Id. 443. ⁶ 11 Id. 138.

Fifth Exemption. Memorandum or agreement made between the master and mariners of any ship or vessel, for wages on any voyage coastwise, from port to port, in Great Britain.

Sixth Exemption. Letters containing any agreement (not before exempted), in respect of any merchandise, or evidence of such an agreement, which shall pass by the post between merchants and other persons carrying on trade or commerce in Great Britain, and residing, and actually being, at the time of sending such letters, at the distance of fifty miles from each other.

A letter by a son who managed his mother's business, to a creditor of his mother, residing above fifty miles from him, containing a promise to pay the debt of the mother, is within this exemption. *McKenzie v. Banks*, 5 T. R. 176.

The statute only requires an agreement to be stamped when the matter thereof shall be of the value of 20*l.* or upwards. It therefore only applies when the value of the contract is measurable; thus a contract of marriage may be proved by unstamped letters. *Orford v. Cole*, 2 Stark. 351.¹ And a memorandum by a wharfinger, of the receipt of goods, to be shipped in a particular manner, may be given in evidence to show the terms upon which they were received, without a stamp, the value of the goods being above 20*l.*, but the wharfage being of less amount. *Chadwick v. Sills*, R. and M. 15. A written paper, delivered by the auctioneer to the bidder, to whom lands were let by auction, containing the description of the lands, the term for which they were let to the bidder, and the rent payable, but not signed by the auctioneer, or any of the parties, was held not to require a stamp, nor to exclude parol evidence, since it was collateral to the taking, and was no more than if the auctioneer had told the defendant on what terms he was to hold. *Ramsbottom v. Tunbridge*, 2 M. and S. 434. So a proposal from A. to B. to let to B. a piece of land, on the terms contained in a written agreement between B. and C., A. afterwards agreeing that B. should have the land on the terms proposed, does not require a stamp. *Drant v. Brown*, 5 D. and R. 582.² 3 B. and C. 665, S. C. *Hawkins v. Warre*, 3 B. and C. 690.³ So a mere order for goods does not require a stamp; *Ingram v. Lea*, 2 Campb. 521; but a written paper signed by an auctioneer, and delivered to the bidder, to whom lands were let by auction, containing the terms of the letting, and the rent payable, must be stamped. *Ramsbottom v. Mortley*, 2 M. and S. 445.

In an action against an attorney, the plaintiff gave in evidence the following unstamped letter: "I have this day received a bill of exchange for 50*l.* (describing it), which I hold as your attorney, to recover the value on from the respective parties, or to make such other arrangement for your benefit as may appear to me in my

¹ 3 Eng. Com. Law Reps. 378. ² 10 Id. 211. ³ 10 Id. 215.

professional capacity reasonable and proper." It was held that this letter was not evidence of a contract, but a mere acknowledgment of the duty which the party took upon himself to perform, and that it therefore required no stamp. *Langdon v. Wilson*, 7 B. and C. 640 (n). *Mullet v. Hutchinson*, 7 B. and C. 639. 1 M. and R. 522, S. C.

Appraisements.

By 55 Geo. III. c. 184, sch. part 1, appraisement or valuation of any estate or effects, real or personal, heritable or moveable, or of any interest therein, or of the annual value thereof, or of any dilapidations, or of any repairs wanted, or of the materials or labour used or to be used in any buildings, or of any artificer's work whatsoever, must be stamped, where the amount of appraisement does not exceed 50*l.* 2*s.* 6*d.*, where it exceeds 50*l.* and does not exceed 100*l.* 5*s.*, 100*l.* and not 200*l.* 10*s.*, 200*l.* and not 500*l.* 15*s.*, above 500*l.* 1*l.* Where nothing is referred but the mere value of goods, and the repairs of a farm, an appraisement stamp is proper, and not an award stamp. *Leeds v. Burrows*, 12 East, 1. See *Jebb v. McKiernan*, 1 M. and M. 340, post. It seems that the words "appraisement or valuation" do not extend to such as are made merely for the private information of parties, but to such only as are intended to be binding between them. *Atkinson v. Fell*, 5 M. and S. 243.

Awards.

By 55 Geo. III. c. 184, sch. part 1, an award must be stamped with a 1*l.* 15*s.* stamp. The appointment of an umpire made in writing, by two arbitrators, requires no stamp. *Routledge v. Thornton*, 4 Taunt. 704. An agreement stamp is not necessary to an arbitration bond, which, besides the usual covenants, contains an agreement as to the payment of costs. *Re Wansborough*, 2 Chitty, 40. A paper ascertaining the amount of a person's account requires an award stamp. *Jebb v. McKiernan*, 1 M. and M. 340.

Banker's Drafts.

By 55 Geo. III. c. 184, sched. part 1, all drafts or orders for the payment of any sum of money to the bearer on demand, and drawn upon any banker or bankers, or any person or persons acting as a banker, who shall reside or transact the business of a banker, within ten miles of the place where such drafts or orders shall be issued, provided such place shall be specified in such drafts or orders, and provided the same shall bear date on or before the day on which the same shall be issued, and provided the same do not direct the payment to be made by bills or promissory notes, are exempted from stamp duty. A draft, drawn upon "A. B., bricklayer,"

• 14 Eng. Com. Law Reps. 108. • 18 Id. 242.

is not within the exemption. *Castleman v. Ray*, 2 B. and P. 383. A post-dated draft, though not intended to be used till the day, must be stamped. *Allen v. Keeves*, 1 East, 435. Payments made by a banker, under a post-dated draft, drawn by a customer who has no funds in his hands, may be recovered from the holder of the draft, to whom they have been made, and who was acquainted with the fact that the draft was post-dated, of which the banker was ignorant. *Martin v. Morgan*, Gow, 128, 3 B. Moore, 635, S. C.; and see *Waters v. Brogdon*, 1 Y. and J. 459.

Bills of Exchange.

By 55 Geo. III. c. 184, the following stamps are imposed on bills of exchange:—

INLAND BILL of exchange, draft, or order, to the bearer, or to order, either on demand or otherwise, of any sum of money.

	£. s. d.		£. s. d.	Not exceed- ing 2 months after date, or 60 days after sight.		If exceeding two months after date, or 60 days after sight.	
				£. s. d.		£. s. d.	
Amounting to	2 0 0	and not exceeding	5 5 0	.. 0	1 0	.. 0	1 6
Exceeding	5 5 0		20 0 0	.. 0	1 6	.. 0	2 0
	20 0 0		30 0 0	.. 0	2 0	.. 0	2 6
	30 0 0		50 0 0	.. 0	2 6	.. 0	3 6
	50 0 0		100 0 0	.. 0	3 6	.. 0	4 6
	100 0 0		200 0 0	.. 0	4 6	.. 0	5 0
	200 0 0		300 0 0	.. 0	5 0	.. 0	6 0
	300 0 0		500 0 0	.. 0	6 0	.. 0	8 6
	500 0 0		1000 0 0	.. 0	8 6	.. 0	12 6
	1000 0 0		2000 0 0	.. 0	12 6	.. 0	15 0
	2000 0 0		3000 0 0	.. 0	15 0	.. 1	5 0
	3000 0 0			.. 1	5 0	.. 1	10 0

Inland bills, drafts, or orders for the payment of any sum of money, though not made payable to the bearer or to order, if the same shall be delivered to the payee, or some person on his behalf, have the same duty as on a bill of exchange, for the like sum payable to bearer or order.

Inland bills, drafts, or orders, for the payment of any sum of money weekly, monthly, or at any other stated periods, if made payable to the bearer or to order, or if delivered to the payee or some person on his behalf, where the total amount of the money thereby made payable shall be specified therein, or can be ascertained therefrom, bear the same duty as on a bill payable to bearer or order, on demand, for a sum equal to such total amount. And where the total amount of the money thereby made payable shall be indefinite, the same duty as on a bill, on demand, for the sum therein expressed only.

Where the total amount of the money thereby made payable shall be indefinite, the same duty as on a bill, on demand, for the sum therein expressed only.

And the following instruments *shall be deemed and taken to be* inland bills, drafts, or orders, for the payment of money within the intent and meaning of this schedule; viz.

All drafts or orders for the payment of any sum of money by a bill or promissory note, or for the delivery of any such bill or note in payment or satisfaction of any sum of money, where such drafts or orders shall require the payment or delivery to be made to the bearer, or to order, or shall be delivered to the payee, or some person on his or her behalf.

All receipts given by any banker or bankers, or other person or persons, for money received, which shall entitle the person or persons paying the money, or the bearer of such receipts, to receive the like sum from any third person or persons.

And all bills, drafts, or orders, for the payment of *any sum of money* out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, if the same shall be made payable to the bearer or to order, or if the same shall be delivered to the payee, or some person on his or her behalf.

It was the object of the legislature, in framing this last provision, to treat as promissory notes and bills of exchange, and to subject to stamp duty, such instruments as, being payable on a contingency, or out of a particular fund, could not, in strictness, fall under that denomination. *Per Lord Ellenborough, Firbank v. Bell*, 1 B. and A. 36; and see *Jones v. Simpson*, 2 B. and C. 321.* In order to prove the payment of money pursuant to order, the following letter was given in evidence: "Messrs. B. and H., when the mahogany, *per* Regent, is sold, you will please pay over to Messrs. P. H. and W. 1500*l.*, in such bills as you receive from the said sale. S. Mann." Messrs. P. H. and W. inclosed this letter in another, addressed by them to B. and H.; and B. and H., in reply, wrote promising to pay over the money. The letter from P. H. and W. was stamped with an agreement stamp; but it was objected that the letter from Mann was an order for payment of money out of a fund which may or may not be available, and that it ought to have been stamped accordingly, and of this opinion was the court. *Firbank v. Bell*, 1 B. and A. 36. F. and Co. wrote to S. and Co. the following letter: "We request you will pay to Messrs. H. and Son, or their order, out of the first proceeds that become due of our stock of gunpowder now in your charge, 600*l.*, and charge the same to our account." S. and Co., in answer, stated that they had no objection to pay as directed, provided they were in funds for that purpose, and subject to the payment of their advances; and other letters passed on the subject. The two first letters were stamped with an agreement stamp, on payment of a penalty. It was held that this case fell within the authority of *Firbank v. Bell*; and that the first

* 9 Eng. Com. Law Reps. 99.

letter was not admissible, not having been stamped at the time when it was written. *Butts v. Swan*, 2 B. and B. 78;* 4 B. Moore, 484, S. C. But in order to come within this clause, the instrument should be for the payment of a specified sum; and therefore, where A., having consigned goods to B., sent him the following order,—“Pay to A. B. the proceeds of a shipment of twelve bales of goods, value about 2000*l.*, consigned by me to you;” and B., by writing, consented to pay over the full amount of the net proceeds of the goods, it was held that neither of these instruments came within the above clause. *Jones v. Simpson*, 2 B. and C. 318;† and see *Rosc. Dig. Bills of Exchange*, p. 31.

Foreign bills.] A FOREIGN BILL of exchange (a bill of exchange drawn in, but payable out of Great Britain), if drawn singly, and not in a set, the same duty as on an inland bill, of the same amount and tenor.

Foreign bills of exchange, drawn in sets, according to the custom of merchants, for every bill of each set.

	£	£	s. d.
Where the sum made payable } thereby shall not exceed . . .	100		1 0
And where it shall exceed . . .	100 and not exceed 200 . .		3 0
.	200	500 . .	4 0
.	500	1000 . .	5 0
.	1000	2000 . .	7 6
.	2000	3000 . .	10 0
And where it shall exceed		3000 . .	15 0

A bill drawn in Ireland, with blanks for the sum, the date, and the drawee's name, and transmitted to England, in order to have the blanks filled up, does not require an English stamp. *Snaith v. Mingay*, 1 M. and S. 87. *Crutchley v. Mann*, 5 Taunt. 529.‡ So a bill sketched out and accepted here, and transmitted to a person abroad for his signature as drawer, is a foreign bill, does and not require an English stamp. *Boehm v. Campbell, Gow*, 56.‡

A bill payable to the drawer's order, and taken up by him, may be re-issued without a fresh stamp; *Callow v. Lawrence*, 3 M. and S. 97, *Hubbard v. Jackson*, 4 Bingh. 390;§ but a bill payable to the order of a third person, and paid by the drawer cannot be re-issued by him, for it would wrongfully charge the payee. *Beck v. Robley*, 1 H. Bl. 89 (n).

What alteration of a bill requires a new stamp.] If a bill or note is altered in a material part, though by the consent of all parties,

* 6 Eng. Com. Law Reps. 28. † 9 Id. 99. ‡ 1 Id. 179.

§ 5 Id. 459. ¶ 15 Id. 12.

and though the alteration be made by a stranger, *Master v. Miller*, 2 H. Bl. 141, after it has once issued, it requires a new stamp; *Bayl. on bills*, 89, 4th ed.; and such alteration not only makes a new stamp necessary, but vacates the bill (independently of the stamp laws), except as between the parties consenting to such alteration. *Ibid.*; see *Downes v. Richardson*, 5 B. and A. 680.*

An alteration in the date of a bill, payable after date, *Walton v. Hastings*, 4 Campb. 233, *Outhwaite v. Luntley*, 4 Campb. 179, or inserting words, rendering a bill or note negotiable, which was not so originally, *Kershaw v. Cox*, 3 Esp. 246, *Knill v. Williams*, 10 East, 437, or the consideration of the value received, *Knill v. Williams*,¹ 10 East, 431, is a material alteration. So where the drawer, without the consent of the acceptor, added the words "payable at Mr. B.'s, Chiswell Street," to the acceptance, this alteration was held to be material, *Cowie v. Halsall*, 4 B. and A. 197,² decided after *Roue v. Young*, 2 B. and B. 165;³ and a similar alteration has been held to be material, since stat. 1 and 2 Geo. IV. c. 78, for the right of an indorsee to sue his indorser, would, according to the altered bill, be complete, upon default made at the banker's, and notice thereof; whereas, the acceptor not having in reality undertaken to pay there, would have committed no default by such non-payment. *Macintosh v. Haydon*, R. and M. 362. See 1 Campb. 82 (n). If the alteration was merely the correction of a mistake, and in furtherance of the original intent of the parties, as inserting the words "or order" in a bill intended to be negotiable, it will not require a new stamp, *Cox. v. Kershaw*, 3 Esp. 246, so a mistake in the date may be corrected. *Brutt v. Picard*, R. and M. 37. See *Bayley on bills*, 92, 4th ed.

What is such an issuing of a bill as to render an alteration fatal.] A bill is *prima facie* considered as issued as soon as it is passed away by the drawer, or accepted by the drawee, and not before. *Bayley on bills*, 93, 4th ed. An exchange of acceptances is an issuing; *Cardwell v. Martin*, 9 East, 190; but a bill is not issued so as to make an alteration fatal, until it is in the hands of a person entitled to make a claim thereon. *Downes v. Richardson*, 5 B. and A. 674.* A bill altered before negotiation, without the consent of the acceptor, may be enforced against him, if he assent to the alteration. *Ibid.* *Kennerly v. Nash*, 1 Stark. 452;⁴ and see *Jacobs v. Hart*, 2 Stark. 45,⁵ *Stevens v. Lloyd*, 1 M. and M. 292.

The onus of proving the alteration made before negotiation lies upon the plaintiff. *Johnson v. Duke of Marlborough*, 2 Stark. 313.*

An objection to a bill or note, for want of a proper stamp, must be taken before it is read. 2 Stark. Ev. 293.

* 7 Eng. Com. Law Reps. 277. 7 6 Id. 399. * 6 Id. 53. * 2 Id. 456.

¹ 3 Id. 237. * 3 Id. 360.

Bills of Sale of Ships.

By 6 Geo. IV. c. 41, s. 1, bills of sale, assignments, and mortgages of ships, are exempted from stamp duty.

Bills of Lading.

Bills of lading for goods, merchandise, or effects to be exported, 48 Geo. III. c. 149, sch. part 1, or to be carried coastwise, 55 Geo. III. c. 184, sch. part 1, require a 3s. stamp.

Bonds.

A bond conditioned for the payment by quarterly payments of an annual rent is within 48 Geo. III. c. 149, sched. (similar provision 55 Geo. III. c. 184), which imposes a duty on bonds given as a security for the payment of any definite and certain sum of money, and must be stamped accordingly. *Attree v. Anscomb*, 2 M. and S. 88. The clause in 48 Geo. III. c. 149 (similar provision 55 Geo. III. c. 184), imposing a stamp upon bonds given as a security for the repayment of any sum or sums of money to be thereafter lent, advanced, or paid, or which may become due upon an account current, is to be construed as applying to the condition of the bond without regard to the amount of the penalty, which is not to be considered as limiting the extent of the security where such bond is given to secure the payment of a final balance or account stated. *Scott v. Allsopp*, 2 Price, 20. See *Williams v. Rawlinson*, 3 Bingh. 71.⁴ As to a bond to secure damages and costs. See *Lopez v. De Tastet*, 8 Taunt. 712.⁵

Cognovit.

A cognovit requires no stamp, for it is a mere acknowledgment of an account, unless matter of agreement be contained in it. *Ames v. Hill*, 2 B. and P. 150. *Reardon v. Swabey*, 4 East, 188¹

Deeds.

A deed indorsed on another deed, as a farther security for advances to be made under the latter deed, was held exempted, by 48 Geo. III. c. 149, from the *ad valorem* duty, the latter deed being stamped with an *ad valorem* stamp. *Robinson v. Macdonnell*, 5 M. and S. 228. A conveyance by debtors to trustees in trust to sell, and with the proceeds to discharge, first, debts due to the trustees, and then debts due to other creditors, with a resulting trust for the original debtors, does not require an *ad valorem* stamp, as upon a sale or mortgage under 55 Geo. III. c. 184. *Coates v. Perry*, 3 B. and B. 48.²

¹ 11 Eng. Com. Law Reps. 34. ⁴ 4 Id. 258. ⁵ 7 Id. 345.

Foreign Instruments.

If a stamp is necessary to render an instrument valid in a foreign country, it cannot be received in evidence without that stamp here. *Per Lord Ellenborough, Clegg v. Levy*, 3 *Campb.* 167. *Alves v. Hodgson*, 7 *T. R.* 241. A deed made in England to be carried into effect abroad must be stamped; *Stonelake v. Babb*, 5 *Burr.* 2673; but a contract made at sea requires no stamp. *Ximenes v. Jacques*, 1 *Esp.* 311. As to the stamp of a bill of exchange drawn in Ireland, but filled up here, *vide ante*, p. 125.

Where in an action on a bill dated Paris, the defence was that it was drawn in London, and so void for want of a stamp, and it was proved that the drawer was in London on the 3d March (the bill being dated the 1st), Lord Ellenborough said, "It is not probable that this bill was drawn in Paris 1st March, but if it was proved ever so distinctly that it was not drawn in Paris 1st March, it would not follow that it was not drawn there at some other time, or that it was drawn in England. Drawing here with a foreign date, to evade the stamp duties, is a very serious offence, and the fact must be made out by distinct evidence." *Abraham v. Dubois, Bayley*, 67, 4 *Campb.* 269. *Bire v. Moreau*, 2 *C. and P.* 376.*

Policies of Insurance.

By 35 Geo. III. c. 63, s. 13, "nothing in that act shall be construed to extend to prohibit the making of any alteration which may lawfully be made in the terms or conditions of any policy of insurance duly stamped, after the same shall have been underwritten; or to require any additional stamp duty by reason of such alteration, so that such alteration be made before notice of the determination of the risk originally insured, and the premium or consideration originally paid or contracted for, exceed the rate of 10s. per cent. on the sum insured; and so that the thing insured shall remain the property of the same person or persons; and so that such alterations shall not prolong the term insured beyond the period allowed by this act, and so that no additional or further sum shall be insured by reason or means of such alteration." A mere extension of the time of sailing is within the above clause, and the new alteration requires no new stamp. *Kensington v. Inglis*, 8 *East*, 273. See *Brocklebank v. Sugrue*, 1 *Barn. and Adol.* 81. So a memorandum waiving the warranty of sea-worthiness. *Weir v. Aberdeen*, 2 *B. and A.* 325. But where a policy on "a ship and outfit" was altered, by inserting "ship and goods," it was held to require a new stamp; *Hill v. Patten*, 8 *East*, 373; and to be void against the underwriters, though they had assented to the alteration. *Ibid.*

* 12 Eng. Com. Law Reps. 180.

Promissory Notes.

By 55 Geo. III. c. 184, sched. part 1, a promissory note, for the payment, to the *bearer on demand*, of any sum of money, is subject to the following duties:

	£	s.		£	s.	£	s.	d.
Not exceeding	1	1	.	0	0	0	0	5
Exceeding	1	1	and not exceeding	2	2	0	0	10
	2	2	.	5	5	0	1	3
	5	5	.	10	0	0	1	9
	10	0	.	20	0	0	2	0
	20	0	.	30	0	0	3	0
	30	0	.	50	0	0	5	0
	50	0	.	100	0	0	8	6

which said notes may be re-issued after payment thereof, as often as shall be thought fit.

Promissory note for the payment, in any other manner than to the bearer on demand, but not exceeding two months after date, or sixty days after sight, of any sum of money:

	£	s.		£	s.	£	s.	d.
Amounting to	2	0	and not exceeding	5	5	0	1	0
Exceeding	5	5	.	20	0	0	1	6
	20	0	.	30	0	0	2	0
	30	0	.	50	0	0	2	6
	50	0	.	100	0	0	3	6

These notes are not to be re-issued after being once paid.

Promissory note for the payment either to the bearer on demand, or in any other manner than to the bearer on demand, but not exceeding two months after date, or sixty days after sight, of any sum of money:

	£		£	£	s.	d.
Exceeding	100	and not exceeding	200	0	4	6
	200	.	300	0	5	0
	300	.	500	0	6	0
	500	.	1000	0	8	6
	1000	.	2000	0	12	6
	2000	.	3000	0	15	0
	3000	.	.	1	5	0

These notes are not to be re-issued after being once paid.

Promissory note for the payment to the bearer or otherwise, at any time exceeding two months after date, or sixty days after sight, of any sum of money:

	£	s.		£	s.	£	s.	d.
Amounting to	2	0	and not exceeding	5	5	0	1	6
Exceeding	5	5	.	20	0	0	2	0

	£	s.		£	s.	£	s.	d.
Amounting to	20	0	and not exceeding	30	0	0	2	6
	30	0	.	50	0	0	3	6
	50	0	.	100	0	0	4	6
	100	0	.	200	0	0	5	0
	200	0	.	300	0	0	6	0
	300	0	.	500	0	0	8	6
	500	0	.	1000	0	0	12	6
	1000	0	.	2000	0	0	15	0
	2000	0	.	3000	0	1	5	0
	3000	0	.	.	.	1	10	0

These notes are not to be re-issued after being once paid.

A promissory note for 40*l.* payable to A. B., or bearer, is in law payable on demand, and requires a 5*s.* stamp. *Whitlock v. Underwood*, 2 B. and C. 167.¹

Receipts.

A receipt or discharge given for or upon the payment of money requires the following stamps by 55 Geo. III. c. 184, sched. part 1 :

	£		£	£	s.	d.
Amounting to	2	and not amounting to	5	0	0	2
	5	.	10	0	0	3
	10	.	20	0	0	6
	20	.	50	0	1	0
	50	.	100	0	1	6
	100	.	200	0	2	6
	200	.	300	0	4	0
	300	.	500	0	5	0
	500	.	1000	0	7	6
	1000 or upwards	.	.	0	10	0
When in full of all demands	.	.	.	0	10	0

An acknowledgment of having received acceptances, with an undertaking to provide for them, has been held to require a receipt stamp. *Scholey v. Walsby, Peake*, 24. So a bill of parcels subscribed "settled by two bills, one at nine, the other at twelve months," was held by Lord Ellenborough to be an acquittance which could not be evidence unless stamped. *Smith v. Kelly, Peake*, 25 (n), 4 Esp. 249, S. C. So the word "settled" under a bill. *Spawforth v. Alexander*, 2 Esp. 621. An account containing acknowledgments of sums received, made at successive times upon the payment of the money, requires a stamp; it differs from an account current where the sums stated to be received are not written in the account, at and upon the receipt of the money, but long after, and only amount to admissions of money received at an antecedent time. *Wright v. Shawcross*, 2 B. and A. 501 (n). See *Jacob v.*

¹ 9 Eng. Com. Law Reps. 51.

Lindsay, 1 East, 460. *Hawkins v. Warre*, 3 B. and C. 696.¹ A mere acknowledgment, not of the payment of money, but of a sum due and owing, (as an I. O. U.) requires no stamp, *Fisher v. Leslie*, 1 Esp. 426. *Israel v. Israel*, 1 Campb. 499. *Childers v. Bulnois, Dow. and Ry. N. P. C.* 8;² but see *Guy v. Harris, Chitty on Bills*, 428, 5th ed. contra. See also *Green v. Davies*, 4 B. and C. 235.¹ So an instrument in these terms, "Mr. T. has left in my hands, 200l.;" *Tomkins v. Ashby*, 6 B. and C. 541;³ or in these, "I have in my hands 3 bills which amount to 120l. 10s. 6d. which I have to get discounted, or return on demand." *Mullett v. Huchison*, 7 B. and C. 639.⁴ 1 M. and R. 522, S. C. So the acknowledgment of the correctness of an account containing a statement of sums advanced, and disbursements made, has been held to require no stamp. *Wellard v. Moss*, 1 Bingh. 134.⁵ A receipt is not inadmissible as such, because it notices the terms and consideration upon which, the money was paid. *Watkins v. Hewlitt*, 1 B. and 1.⁶ So although it contain subsequent matter of agreement, and has no agreement stamp; *Grey v. Smith*, 1 Campb. 387; unless the agreement control or qualify what goes before, when the paper will be inadmissible without an agreement stamp. *Ibid.* See *Corder v. Drakeford*, 3 Taunt. 382. *Clayton v. Burtenshaw*, 5 B. and C. 85.⁴ Where the indorsements of receipts on a bond have left no blank space for receipts of subsequent payments to be written on the bond, such written on an unstamped piece of paper annexed to the bond, are within the exemption of 55 Geo. III. c. 184, sched. p. 1, and admissible. *Orme v. Young*, 4 Campb. 336. An unstamped receipt may be used by a witness to refresh his memory. *Rambert v. Cohen*, 4 Esp. 213. *Maugham v. Hubbard*, 8 B. and C. 14.⁷

COURSE OF EVIDENCE.

Before the jury are sworn, the counsel for the plaintiff has a right, on the cause being called on, to have a witness called on his subpoena. *Hopper v. Smith*, 1 M. and M. 115.

When the jury are sworn, the junior counsel for the plaintiff opens the pleadings, after which, if the proof of the issue rest on the plaintiff, as where the general issue is pleaded, the senior, or leading counsel, states the case to the jury, and after calling and examining witnesses in support of it, the counsel for the defendant are heard, and if they call any witnesses, the plaintiff's counsel have the general reply. *Tidd*, 908. The production by the defendant of a rule to pay money into court, is not, according to the practice of the Common Pleas, such evidence as to give the plaintiff's counsel the right to reply. 2 Taunt. 267. Where there are several issues, some of which are incumbent on the plaintiff,

¹ 10 Eng. Com. Law Reps. 215. ² 16 Id. 411. ³ 10 Id. 319. ⁴ 13 Id. 269.

⁵ 14 Id. 108. ⁶ 8 Id. 271. ⁷ 5 Id. 1. ⁸ 11 Id. 138. ⁹ 15 Id. 147.

and others on the defendant, it is usual for the plaintiff to begin, and to prove those which are essential to his case; *Jackson v. Hesketh*, 2 Stark. 521; and the defendant then does the same, and afterwards the plaintiff is entitled to go into evidence to controvert the defendant's affirmative proofs. The defendant's counsel is entitled to reply upon such evidence, in support of his own affirmative, and the plaintiff's counsel to a general reply. 1 Stark. Ev. 342. Where a party tenders evidence *primâ facie* admissible, the other party will not be allowed to interpose with evidence for the purpose of excluding it; but it should be received, and expunged if afterwards shown not to be properly receivable. *Jones v. Fort*, 1 M. and M. 196.

It was laid down as a general rule by Lord Ellenborough, that when by pleading, or by means of notice, the defence is known, the counsel for the plaintiff is bound to open the whole case in chief, and cannot proceed in parts, unless some specific fact be adduced by the defendant, to which the plaintiff can give an answer, but that he cannot go into general evidence in reply. *Rees v. Smith*, 2 Stark. 31. But the practice is now altered, and the plaintiff's counsel is at liberty, either at once to enter into the whole of his case, or to make out a *primâ facie* case only, and to reserve his answer to the defendant's case for the reply, but he cannot answer part of the defendant's case in his opening and part in the reply. *Browne v. Murray*, R. and M. 254. *Sylvester v. Hall*, Id. 255 (n). 1 Stark. Ev. 383.

Where the general issue is not pleaded, but issue is joined on a collateral fact, as the execution of a release in assumpsit, or debt, or a right of way in trespass, the proof of which rests on the defendant, his counsel begin, after the pleadings are opened, and have the general reply. *Tidd*, 908. The onus of proving damages does not give the plaintiff's counsel a right to begin. *Bedell v. Russell*, R. and M. 293; but see *Lacon v. Higgins*, 3 Stark. 178, * post. *Roby v. Howard*, 2 Stark. 556. And in trespass, where the general issue is pleaded as to the coming with force and arms, and whatever else is against the peace, and a special plea as to the rest, the issue upon which lies on the defendant, the counsel for the defendant is entitled to begin. *Jackson v. Hesketh*, 2 Stark. 518. The rule as established in practice is, that when the general issue is not pleaded, and the affirmative of the issue lies on the defendant, he is to begin. Per Lord Tenterden, *Cotton v. James*, 1 M. and M. 275. So in an action for a libel, where a justification without the general issue is pleaded, the defendant is entitled to begin. *Cooper v. Wakley*, 1 M. and M. 248. In ejectment by a person claiming under a will against a person claiming under a codicil, if the defendant will admit the will, he is entitled to begin and to have the general reply. *Doe v. Corbett*, 3 Campb. 368; see also *Peake Ev.* 6 (n). So where in an ejectment by

an heir at law against a devisee, the lessor of the plaintiff proved his pedigree and stopped, and the defendant set up a new case, which the lessor of the plaintiff answered by evidence, it was held that the defendant was entitled to the general reply. *Goodtitle v. Braham*, 4 T. R. 497. Where in replevin the defendant avows for rent, and the plaintiff pleads in bar an agreement to set off another sum against the rent, and issue is taken on that plea, the plaintiff is entitled to begin, the affirmative being on him. *Curtis v. Wheeler*, 4 C. and P. 196.* *Williams v. Thomas*, Id. 234.* Where the defendant brings evidence to impeach the plaintiff's case, and also sets up an entire new case, which again the plaintiff controverts by evidence, the defendant's reply in such case is confined to the new case set up by him, for upon that relied upon by the plaintiff, his counsel has already commented in the opening of the defendant's case, and the plaintiff is entitled to the general reply. 1 *Stark. Ev.* 384. *Meagoe v. Simmons*, 3 C. and P. 76.*

Where the defendant proves a payment to the plaintiff, by showing the particulars of demand delivered under a judge's order, in which the plaintiff has credited the defendant, this is the evidence of the defendant, and entitles the plaintiff to a reply. *Rymer v. Cook*, 1 M. and M. 86 (n).

Where the counsel for the defendant opens facts to the jury, which he calls no witnesses to prove, it is in the discretion of the judge to permit the plaintiff's counsel to reply. *Crerar v. Sodo*, 1 M. and M. 85.

Upon an issue on a plea in abatement, which lies upon the defendant, the practice has not been uniform. It has been ruled by Abbott, C. J., that as the plaintiff has to prove the amount of the damages (*but see ante*, p. 132), his counsel is, if he elect to do so, entitled to begin, but the defendant's counsel, admitting the amount, was allowed to begin; *Lacon v. Higgins*, 3 *Stark.* 178;* *see also Roby v. Howard*, 2 *Stark.* 555,* *Stansfield v. Levy*, 3 *Stark.* 8;* but in another case Bayley, J., directed that the defendant should begin, and that the question of damages should, if necessary, be determined afterwards. *Anon.* 2 *Stark. Ev.* 2.

So in an action upon a bill of exchange, where the non-joinder of a joint contractor was pleaded in abatement, Lord Tenterden permitted the defendant to begin, and said that the most convenient rule was, that wherever it appears on the record, or by the statement of the counsel engaged, that there is really no dispute about the sum to be recovered; but the damages are either nominal, or else mere matter of computation, then if the affirmative is on the defendant, he is entitled to begin. *Fowler v. Coster*, 1 M. and M. 241.

Where several defendants in the same interest defend separately,

* 19 Eng. Com. Law Reps. 340. * 19 Id. 361. * 14 Id. 212. * 14 Id. 176.

* 3 Id. 472. * 14 Id. 146.

it was ruled by Gibbs, C. J., that the senior counsel can alone address the jury, and the witnesses are to be examined by the counsel successively, in the same manner as if the defence were joint and not separate. *Chippendale v. Masson*, 4 *Campb.* 174. And in ejectment where the defendants defended in the same right, but by different attorneys and counsel, Lord Tenterden ruled that only one counsel could address the jury. *Doe v. Tindal*, 1 *M. and M.* 314. 3 *C. and P.* 565,* *S. C.*; and see *Perring v. Tucker*, *Id.* 392. But in some cases counsel for each party have been allowed to cross-examine, and to address the jury. *King v. Williamson*, 3 *Stark.* 162;† and see *Massey v. Goyder*, 4 *C. and P.* 162.‡ The leading counsel has a right, in his discretion, to interpose, and to take the examination of a witness out of the hands of his junior, but after one counsel has brought his examination to a close, a question cannot regularly be put to the witness by another counsel on the same side. *Doe v. Roe*, 2 *Campb.* 280.

Demurrer to Evidence.

If a party wishes to withdraw from the jury the application of the law to the fact, and all consideration of what the law is upon the fact, he then demurs in law upon the evidence, and the precise operation of that demurrer is, to take from the jury and to refer to the judge the application of the law to the fact. *Per Eyre, C. J.*, *Gibson v. Hunter*, 2 *H. Bl.* 206. On a demurrer to circumstantial evidence, the party offering the evidence is not obliged to join in demurrer, unless the party demurring will distinctly admit upon the record every fact, and every conclusion which the evidence offered conduces to prove. *Id.* 187. But where the evidence is certain, as where it consists of matter of record, or other matter in writing, the party offering the evidence may be compelled to join in demurrer or waive the evidence. *Id.* 206. The whole proceeding of a demurrer to evidence is under the control of the judge, before whom the trial is had, who may overrule the demurrer, upon which the party demurring may tender a bill of exceptions. *Id.* 208. Where a demurrer to evidence is admitted, it is usual for the court, or judge, to give orders to the associate to take a note of the testimony, which is signed by the counsel on both sides, and the demurrer is affixed to the *postea*. *Tidd*, 916. *B. N. P.* 313. The damages may be assessed either by the principal jury, conditionally, before they are discharged, or by another jury upon a writ of inquiry after the demurrer is determined, and it is said to be the most usual course, when there is a demurrer to evidence, to discharge the jury without further inquiry. *Ibid.*

* 14 Eng. Com. Law Reps. 452. † 14 *Id.* 175. ‡ 19 *Id.* 321.

Bill of Exceptions.

A bill of exception lies upon some point of law, either in admitting or denying evidence, or a challenge, or some matter of law arising upon fact not denied, in which either party is overruled by the court. *B. N. P.* 316. If such bill be tendered, and the exceptions in it are truly stated, then the judge (by stat. Wesm. 2, 13 Ed. 1 c. 31) ought to set his seal, in testimony that such exceptions were taken at the trial, but if the bills contain matters false, or untruly stated, or matters in which the party was not overruled, he is not obliged to affix his seal. *B. N. P.* 316. The bill of exceptions must be tendered at the trial, and the substance of it reduced into writing at the time. *Ibid. Tidd*, 912. As a bill of exceptions can only be argued on error, where a writ of error will not lie there can be no bill of exceptions. *Ibid*; but see 2 *Inst.* 427.

EVIDENCE IN PARTICULAR ACTIONS.

ASSUMPSIT ON SALE OF REAL PROPERTY.

Vendor against Vendee.

IN an action of assumpsit by the vendor of real property on the purchaser's default in completing the contract, the plaintiff must prove the contract; the performance, by himself, of all conditions precedent, and the defendant's default.

Proof of the contract.] It will be necessary to prove a contract in writing, for by the statute of frauds, 29 Car. II. c. 3. s. 4, no action shall be brought whereby to charge any person upon any contract, or sale, of lands, tenements, or hereditaments; or any interest in or concerning them, unless the agreement upon which such actions shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto, by him, lawfully authorised.

The note, or writing, must specify the terms, for otherwise all the danger of perjury, which the statute intended to guard against, would be let in. *Sugd. V. and P.* 76. Thus where an auctioneer's receipt for the deposit was set up as an agreement, it was rejected, because it did not state the price to be paid for the estate, *Blagden v. Bradbear*, 12 Ves. 466, but had the receipt referred to the conditions of sale, so as to have entitled the court to look at them for the terms, it might have been enforced as an agreement. *Ibid.* So if a letter, properly signed, does not contain the whole agreement, yet if it actually refer to a writing that does, it will be sufficient, though the latter writing is not signed, and parol evidence is admissible to show the identity of the writing referred to. *Clinan v. Cooke*, 1 Sch. and Lef. 22. *Allen v. Bennet*, 3 Taunt. 169; see also *Gordon v. Trevelyan*, 1 Price, 64, *Cooper v. Smith*, 15 East, 103, *Sugd. V. and P.* 76, *Richards v. Porter*, 6 B. and C. 437, *Smith v. Surman*, 9 B. and C. 561.^s The agreement cannot be enforced unless both the contracting parties are named in it. *Charlewood v. Duke of Bedford*, 1 Atk. 497. *Wheeler v. Collier*, 1 M. and M. 123. A bill to amend the law with regard to the proof of contracts under the statute of frauds has been introduced this session into the House of Commons, by Sir E. B. Sugden, and, if

^s 13 Eng. Com. Law Reps. 229. ^s 17 Id. 443.

passed before the publication of this Digest, it will be found in the Appendix.

With regard to the signing, it has been held that a printed name is sufficient. *Saunderson v. Jackson*, 2 B. and P. 238, on the 17th sec. if recognised by, or brought home to the party, as having been printed by his authority; *Schneider v. Norris*, 2 M. and S. 288, on the 17th sec., and it is immaterial in what part of the agreement the name is signed; *ibid. Knight v. Crockford*, 1 Esp. 190; but whether the writing of his name by the defendant, in the body of the instrument, for a particular purpose, (as stating a rent to be paid to himself,) be a sufficient signing, appears to be doubtful. *Stokes v. Moore*, 1 Cox, 219. *Cox's note* to 1 P. Wms. 771. *Sugd. V. and P.* 89. A signing as witness is sufficient, if the party signing is cognizant of the contents of the instrument. *Welford v. Beasley*, 3 Atk. 503. *Harding v. Crethorn*, 1 Esp. 58.

The statute requires the agreement to be signed by the party to be charged therewith, or some other person thereunto, by him, lawfully authorised. It is good though only signed by the party to be charged, and not by the other party. *Seton v. Slade*, 7 Ves. 275; and see the cases collected *Sugd. V. and P.* 73; see also *Saunderson v. Jackson*, 2 B. and P. 238, on the 17th sec.; *sed vide Wheeler v. Collier*, 1 M. and M. 125. With regard to the person authorised by the party to sign, it is settled that such person need not be authorised in writing. *Coles v. Tregothick*, 9 Ves. 250. *Emmerson v. Heelis*, 2 Taunt. 48. A sale by auction is within the statute of frauds, and the auctioneer is the agent for both the vendor and vendee. *Kenworthy v. Schofield*, 2 B. and C. 947.^a The agent must be a third person, and not one of the parties; *Wright v. Dannah*, 2 Campb. 203; on the 17th sec.; and, therefore, if the action is brought against the purchaser by the auctioneer himself, the signing of the defendant's name by the auctioneer will not be sufficient to satisfy the statute. *Farebrother v. Simmons*, 5 B. and A. 333,¹ on the 17th sec. Where an agent is authorised to sell at a particular price, his clerk in his absence cannot contract without a special authority for that purpose. *Coles v. Tregothick*, 9 Ves. 234. *Henderson v. Barnewall*, 1 Y. and J. 387. *Sugd. V. and P.* 91.

Performance of conditions precedent.] The plaintiff must be prepared to prove that he has performed all the conditions precedent stated in his declaration. Thus, where the plaintiff agreed to sell to the defendant a school-house, &c., and to convey the same to him on or before the first of August, 1797, and to deliver up the possession to him on the twenty-fourth June, 1796, and in consideration thereof defendant agreed to pay the plaintiff 120*l.* on or before the first of August, 1797, it was held that the plaintiff could not maintain an action for the 120*l.*, without showing that he had con-

^a 9 Eng. Com. Law Reps. 286. ¹ 7 Id. 120.

veyed, or tendered a conveyance, to the defendant. *Glazebrook v. Woodrow*, 8 T. R. 366; see the cases collected 1 Saund. 320, a. 2 Saund. 352, b (n). But where the performance of a condition precedent has been dispensed with by the defendant, the plaintiff may aver such dispensation, as that he tendered a draft of the conveyance to the defendant, and offered to execute and deliver such conveyance to him, but that he discharged the plaintiff from executing the same. *Jones v. Berkley*, Doug. 684. *Wilmot v. Wilkinson*, 6 B. and C. 506.* Where by the terms of the contract the purchaser is to prepare the conveyance, the seller may bring an action for the purchase money without tendering a conveyance; see *Hawkins v. Smith*, 3 East, 410; and it seems, that in the absence of any express stipulation, the purchaser is bound to prepare and tender the conveyance. *Baxter v. Lewis*, Forest, 61, Sugd. V. and P. 222; but see the cases cited, 3 Stark. Ev. 1609 (n).

The plaintiff must prove his title to the property sold, and if he produces his title deeds at the trial, in proof of his title, it seems that it will not be necessary for him to call the subscribing witnesses. *Thompson v. Miles*, 1 Esp. 185; Sugd. V. and P. 216; 2 Phil. Ev. 99; but see *Crosby v. Percy*, 1 Campb. 304, contra. If the purchaser has not made an application for the title before the commencement of the action, and no time is fixed upon for completing the contract, it will be sufficient if the plaintiff can show a good title in himself at the time of trial. *Thompson v. Miles*, 1 Esp. 185; see *Wilde v. Forte*, 4 Taunt. 336; *Bartlett v. Tuchin*, 6 Taunt. 259.¹

Defence.

It is a good ground of defence under the general issue that an erroneous mis-statement, or mis-description, has been wilfully introduced into the conditions of sale, to make the land appear more valuable. *Duke of Norfolk v. Worthy*, 1 Campb. 340; and see *Vernon v. Keys*, 12 East, 637. So where a person is employed to bid by the vendor at the sale, not for the purpose of preventing a sale at an undervalue, but to take advantage of the eagerness of bidders to screw up the price, it seems that this will be deemed a fraud. *Smith v. Clarke*, 12 Ves. 483. Sugd. V. and P. 24. *Howard v. Castle*, 6 T. R. 642. *Crowder v. Austen*, 3 Bingh. 368.^m *Wheeler v. Collier*, 1 M. and M. 126.

The defendant may also insist upon a defect in the plaintiff's title, and it seems that a court of law will enter into equitable objections to a title. *Maberley v. Robins*, 5 Taunt. 625.ⁿ *Elliot v. Edwards*, 3 B. and P. 181. Sugd. V. and P. 219; but see *Alpass v. Watkins*, 8 T. R. 516. *Romilly v. James*, 1 Marsh. 600.^v 2 Phil. Ev. 101; see also *R. v. Toddington*, 1 B. and A. 560. So the defendant may show that the plaintiff had an interest in the pre-

* 13 Eng. Com. Law Reps. 236. ¹ 1 Id. 379. ^m 13 Id. 11.

ⁿ 1 Id. 214. ^v 1 Id. 379.

mises for a shorter term than he contracted to sell; *Farrar v. Nightingal*, 2 Esp. 639, *Hibbert v. Shee*, 1 Campb. 113; or that the premises are subject to an incumbrance or annual payment, of which no notice has been given. *Turner v. Beaurain*, Sugd. V. and P. 252. *Barnwell v. Harris*, 1 Taunt. 430. The purchaser may reject a questionable title, and therefore a purchaser of a lease under a contract, describing it as containing none but the usual covenants, is not bound to accept the assignment, if the lease contains an unusual covenant, though such covenant is probably bad in point of law. *Hartley v. Pehall*, Peake, 131; see also *Waring v. Hoggart*, R. and M. 39. Where a lease was sold by auction, and produced and read at that time, and amongst the premises demised was a summer-house, which had been pulled down before the sale, it was held that the purchaser was not bound to complete the contract, though no mention was made of the summer-house in the particulars of sale. *Granger v. Warms*, 4 Campb. 83. Where the property consisted of several parcels sold by auction in distinct lots, Lord Kenyon held that the vendor, having made out a title to a single lot only, the whole contract might be rescinded, considering the purchase of the several lots as having been made with a view to a joint concern, and that the contract, for the convenience and interest of the purchaser, must be understood to be one entire contract for the whole. *Chambers v. Griffith*, 1 Esp. 149; but see *Emmerson v. Heelis*, 2 Taunt. 38. *James v. Shore*, 1 Stark. 36,^a *supra*. Sugd. V. and P. 257, where it is said that *Chambers v. Griffith* cannot be maintained as an authority. The purchaser may refuse to take a conveyance executed under a power of attorney, as it multiplies his proofs. *Coore v. Calloway*, 1 Esp. 116. *Richards v. Barton*, Id. 269.

Where a purchaser makes a proposal to purchase, and gives the vendor a certain time to consider it, he may within that time retract the offer. *Routledge v. Grant*, 4 Bingh. 663,^a *infra*.

Vendee against Vendor.

If the vendor refuses, or is unable to complete his contract, the purchaser may either declare specially on the contract, or in case he has made a deposit, or paid any part of the purchase money, he may recover it in an action for money had and received. In the former action he will be entitled to recover the deposit, and also interest, and any expenses to which he may have been put in investigating the title, by way of special damage; in the latter he will be entitled to recover the purchase money or deposit only. *Camfield v. Gilbert*, 4 Esp. 221. *Walker v. Constable*, 1 B. and P. 306. Sugd. V. and P. 213. In neither form of action can he recover compensation for the fancied goodness of his bargain, where the ven-

dor is, without fraud, incapable of making a title. *Flureau v. Thornhill*, 2 W. Bl. 1078. *Bratt v. Ellis*, Sugd. V. and P. 40. In the above cited case of *Flureau v. Thornhill* the vendor offered to convey such title as he had, or to return the purchase money with interest, circumstances which did not exist in the following case. A person who had contracted for the purchase of an estate, but had not obtained a conveyance, put up the estate for sale, in lots by auction, and engaged to make a good title by a certain day, which he was unable to do, as his vendor never made a conveyance to him; it was held that the purchaser of certain lots at the auction might, in an action for not making a good title, recover not only the expenses which he had incurred, but also damages for the loss he had sustained by not having the contract carried into effect. *Hopkins v. Glazebrook*, 6 B. and C. 31.* The expenses of investigating the title cannot be recovered under a count for money paid. *Campfield v. Gilbert*, 4 Esp. 221.

Special action on the contract.] In a special action on the contract by the purchaser, he must prove the contract, *see ante*, p. 136, the performance by himself of all conditions precedent, the defects of the vendor's title, and when he seeks to recover the deposit, the payment of such deposit. It will not be enough to prove that the title has been deemed by conveyancers to be insufficient. *Campfield v. Gilbert*, 4 Esp. 221. The vendor must be prepared to make out a good title on the day on which the purchase is to be completed. If he delivers an abstract setting out a defective title, the purchaser may object to it, and when the abstract is delivered by the vendor, he must be able to verify it by the title deeds in his possession, and unless a good title is made out at the day fixed, the purchaser will be entitled to rescind the contract. *Cornish v. Rowley*, Selw. N. P. 170, *Berry v. Young*, 2 Esp. 640 (n). It has been ruled by Lord Tenterden that the vendor of a lease is not bound to produce his lessor's title without an express stipulation to that effect. *George v. Pritchard*, R. and M. 417. The plaintiff may be compelled to give the defendant a particular of every matter of fact which he intends to rely upon at the trial, as having been the cause of his not being able to complete the purchase, *Collett v. Thompson*, 3 B. and P. 246, but if a particular has not been given the plaintiff will be at liberty to prove any infraction of the conditions of sale. *Squire v. Tod*, 1 Campb. 293; *see Todd v. Hoggart*, 1 M. and M. 128, *post*, p. 142.

A payment of the deposit to the agent of the vendor, is, in law, a payment to the principal, and in an action against the latter for the recovery of the money, it is immaterial whether it has actually been paid over to him or not. *Duke of Norfolk v. Worthy*, 1 Campb. 337. If the deposit has been paid to the auctioneer, an action

* 13 Eng. Com. Law Reps. 100.

for it will lie against him before payment over to his principal; *Burrough v. Skinner*, 5 Burr. 2639; and see *Edwards v. Hodding*, 5 Taunt. 815; and where an auctioneer signed a contract for the sale of a house in his own name, and received the deposit (his principal being present) and after the purchaser had left the room, paid over the deposit to his principal, it was ruled by Lord Tenterden that the purchaser might, notwithstanding the payment over, maintain an action against the auctioneer for the deposit. *Gray v. Gutteridge*, 3 C. and P. 40.* But it seems that interest on the deposit cannot be recovered from him, except under particular circumstances, and, at all events, not before a demand for the repayment of the money has been made upon him. *Lee v. Munn*, 8 Taunt. 45.† *Farquhar v. Farley*, 7 Taunt. 594.‡ *Sugd. V. and P.* 487. Where an auctioneer does not disclose the name of his principal, an action will lie against himself for damages on breach of contract, *Hanson v. Roberdeau, Peake*, 120; and see *Simon v. Motivos*, 3 Burr. 1921. *Owen v. Gooch*, 2 Esp. 567. Where the purchaser recovers the deposit only from the auctioneer, he may, in a special action against the vendor, recover interest and the expenses of investigating the title. *Farquhar v. Farley*, 7 Taunt. 592.‡

With regard to the damages it seems that the purchaser may recover the deposit with interest, and the expenses of investigating the title. *Richards v. Barton*, 1 Esp. 268. *Turner v. Beaurain*, *Sugd. V. and P.* 214. *Farquhar v. Farley*, 7 Taunt. 592;‡ but see *Wilde v. Forte*, 4 Taunt. 341. *Camfield v. Gilbert*, 4 Esp. 223. *Sugd. V. and P.* 488. If the residue of the purchase money has been lying ready, without any interest being made of it, such interest may be recovered. *Sugd. V. and P.* 488.

Money had and received to recover deposit.] In an action for money had and received to recover the deposit, or any portion of the purchase money which may have been paid, the plaintiff must prove the contract, *ante*, p. 136, the payment of the money, *supra*, and the defects in the vendor's title, *ante*, p. 138.

To enable the purchaser to maintain this action the contract must be disaffirmed *ab initio*. If the purchaser has had an occupation of the premises under the contract, he adopts the contract, and cannot disaffirm it afterwards by quitting the premises, as the parties cannot be put in the same situation in which they before stood. *Hunt v. Silk*, 5 East, 449. If the original contract be void, as if it be a parol agreement for the sale of lands, the purchaser can only recover his deposit in this form of action, since he cannot sue upon the special contract. *Walker v. Constable*, 1 B. and P. 306. Interest cannot be recovered under a count for money had and received. *Ibid.* *Tappendal v. Randall*, 2 B. and P. 472. *Marshall v. Poole*, 13 East, 100. Where the vendor was unable to com-

* 1 Eng. Com. Law Reps. 277. † 14 Id. 201. ‡ 4 Id. 14. § 2 Id. 228.

plete his contract on the day, and it also appeared that the purchaser was not prepared to pay the purchase money on that day, Best, C. J. held that the agreement was entirely vacated, and the purchaser entitled to recover his deposit. *Clarke v. King, R. and M.* 394. Although a purchaser be expressly required to tender a conveyance, yet if a bad title be produced, he may maintain an action for the recovery of his deposit without tendering a conveyance. *Lowndes v. Bray, Sugd. V. P.* 223. So where the vendor has, by selling the estate, incapacitated himself from executing a conveyance to the purchaser, further trouble and expense on his part are unnecessary, and he may accordingly sustain an action without tendering a conveyance, or the purchase money. *Knight v. Crockford, 1 Esp.* 189, *Sugd. V. and P.* 223. And if the vendor, when called upon for an abstract of his title, although before the time when the conveyance was to be made, appears to have no title, the vendee may rescind the contract. *Roper v. Combes, 6 B. and C.* 585.* If a material fact, affecting the title, is omitted in the conditions of sale, the vendee may rescind the contract, and recover the deposit. *Waring v. Haggart, R. and M.* 39. The plaintiff cannot, at the trial, insist upon any objection which he might have taken, but neglected to take, at the time of the rescinding the contract. *Todd v. Haggart, 1 M. and M.* 128.

ASSUMPSIT FOR USE AND OCCUPATION.

This action is grounded on stat. 11 G. II. c. 19, s. 14, by which it is enacted that it shall be lawful for landlords, where the agreement is not by deed, to recover a reasonable satisfaction for the lands, tenements, or hereditaments, held or occupied by the defendants, in an action on the case, for the use and occupation of what was so held or enjoyed: and, if on the trial of such action, any parol demise, or any agreement (not being by deed) whereon a certain rent was reserved, shall appear, the plaintiff shall not therefore be nonsuited, but may make use thereof as evidence of the quantum of damages to be recovered.—The plaintiff must prove his own title to sue, the defendant's occupation, and the amount of damages.

Plaintiff's title.] If the defendant has come in under the plaintiff, or has acknowledged his title, as by the payment of rent to him, he will not be permitted to impeach it at the trial; *Sullivan v. Stradling, 2 Wils.* 215, *Cooke v. Loxley, 5 T. R.* 4, *Phipps v. Sculthorpe, 1 B. and A.* 50; and it is not material in such case that the plaintiff should have the legal title; *Hull v. Vaughan, 6 Price,* 157; but unless the defendant came in under the plaintiff, or has recognised his title, the plaintiff can only recover rent from the time of the legal estate being vested in him. *Cobb v. Carpenter, 2 Campb.* 13 (n).

* 13 Eng. Com. Law Reps. 246.

There is a distinction between the case where a person has actually received possession from one who has no title, and the case where he has merely attorned by mistake to one who has no title; in the former case the tenant cannot (except under very special circumstances) dispute the title, in the latter he may. *Per Bayley, J. Cornish v. Searell*, 8 B. and C. 475.⁷ *Rogers v. Pitcher*, 6 Taunt. 202.⁸ *Gravenor v. Woodhouse*, 1 Bingh. 38;⁹ and see the cases cited *infra*, and in "*Replevin*," "*Evidence on plea of non demisit or non tenuit*." Where A. hired apartments by the year from B., and B. afterwards let the entire house to C., who sued A. for use and occupation, it was held that A. could not impeach C.'s title; *Rennie v. Robinson*, 1 Bing. 147;¹⁰ but where land belonging to a parish was occupied by A., and he paid rent to the churchwardens, who executed a lease of the same land for a term of years to B., and gave A. notice of the lease, in an action for use and occupation by B. against A., it was held that A. was not estopped, by having paid rent to the churchwardens, from disputing B.'s title, and that B. could not derive a valid title from the churchwardens. *Phillips v. Pearce*, 5 B. and C. 433.¹¹ In general the title of the plaintiff is established by the production of the lease or agreement, which is proved in the usual manner, by calling the attesting witness; but if there be no actual lease or agreement, the plaintiff's title may be established by evidence of the defendant having paid rent to him, or submitted to a distress by him. *Panton v. Jones*, 3 Campb. 372. Notice to produce the receipts for rent, and the notice of distress, should in such cases be given. If it appears that the defendant holds under a written agreement not produced, or which when produced cannot be read for want of a stamp, the plaintiff will not be allowed to give parol evidence of the holding, and must be nonsuited. *Brewer v. Palmer*, 3 Esp. 213. *Ramsbottom v. Mortley*, 2 M. and S. 445, *ante*, p. 116.

Defendant's occupation.] It is *prima facie* sufficient for the plaintiff to prove that the defendant occupied the premises, and the continuance of the occupation will be presumed till the contrary appear. *Harland v. Bromley*, 1 Stark. 455.¹² *Ward v. Mason*, 9 Price, 291. It is not necessary for the plaintiff to prove a personal occupation of the premises by the defendant; an occupation which the defendant might have had, if he had not voluntarily abstained from it, is sufficient; *Per Gibbs, C. J. Whitehead v. Clifford*, 5 Taunt. 519,¹³ *Pinero v. Judson*, 6 Bingh. 206;¹⁴ and if A. agree to let lands to B., who permits C. to occupy them, B. may be sued for use and occupation. *Bull v. Sibbs*, 8 T. R. 327; and see *Dingly v. Angrove*, 2 Smith, 18, *Conolly v. Baxter*, 2 Stark. 527.¹⁵ So a tenant who has quitted in pursuance of a parol license from his landlord, and without having given a notice to quit, remains liable, *Mollett v. Brayne*, 2 Campb. 104; and see *Matthews v. Sewell*,

⁷ 15 Eng. Com. Law Reps. 267. ⁸ 1 Id. 355. ⁹ 8 Id. 235. ¹⁰ 8 Id. 275.

¹¹ 11 Id. 264. ¹² 2 Id. 467. ¹³ 1 Id. 173. ¹⁴ 19 Id. 56. ¹⁵ 3 Id. 458.

8 Taunt. 270,¹ *Thompson v. Wilson*, 2 Stark. 379,¹ *Johnstone v. Huddleston*, 4 B. and C. 922,² even though the landlord, on the tenant's quitting, put up a bill in the window for the purpose of having the premises let, *Redpath v. Roberts*, 3 Esp. 225; see *Johnstone v. Huddleston*, 2 B. and C. 922,² unless the landlord has accepted a third person as tenant, which operates as a surrender in law of the first tenant's term. *Thomas v. Cook*, 2 B. and A. 119. Thus where a tenant from year to year, at a rent payable half-yearly, quitted without giving a notice to quit, and the landlord, before the expiration of the next half year, let the premises to another tenant, it was held that the landlord was not entitled to recover rent from the first tenant, from the expiration of the current year when he quitted the premises, to the time when the landlord re-let the same to the second tenant. *Hall v. Burges*, 5 B. and C. 332;¹ and see *Walls v. Atcheson*, 4 Bing. 462.² And in such case, if the tenant quit in the middle of a quarter, the landlord cannot recover rent *pro rata*, for the portion of the quarter during which the tenant occupied. *Grimman v. Legge*, 8 B. and C. 324.² If the landlord has himself determined the occupation by accepting the key of the house, he cannot recover in this action. *Whitehead v. Clifforn*, 5 Taunt. 518.² Although the premises are burnt down, and remain unoccupied, the tenant still continues liable for the rent subsequently accruing. *Baker v. Holtzaffell*, 4 Taunt. 45.

Before the late bankrupt act it was held that assumpsit for use and occupation lay against a lessee, upon his agreement to pay rent during the tenancy, notwithstanding his bankruptcy and the occupation of the assignees during part of the time for which the rent accrued; *Boot v. Wilson*, 8 East. 311; but now, by 6 Geo. IV. c. 16, s. 75, any bankrupt entitled to any lease, or agreement for a lease, if the assignees accept the same, shall not be liable to pay any rent accruing after the date of the commission, or to be sued in respect of any subsequent non-observance or non-performance of the conditions, covenants, or agreements therein contained; and if the assignees decline the same, shall not be liable as aforesaid, in case he deliver up such lease or agreement to the lessor, or such person agreeing to grant a lease, within fourteen days after he shall have had notice that the assignees shall have declined as aforesaid. Where assignees entered and occupied premises in the middle of a year, it was held that use and occupation could not be maintained against them for the bankrupt's occupation as well as their own, without proving that the bankrupt's occupation was at their request. *Naish v. Tallock*, 2 H. Bl. 319; but see *Gibson v. Courthorpe*, 1 D. and R. 205.² So a husband is not liable for the occupation of a house by his wife, *dum sola*, *Richardson v. Hall*, 1 B. and B. 50.²

If, after the determination of a lease, the tenant holds over and

¹ 4 Eng. Com. Law Reps. 101. ² 3 Id. 391. ³ 10 Id. 471. ⁴ 11 Id. 246.
⁵ 13 Id. 52. ⁶ 15 Id. 229. ⁷ 1 Id. 173. ⁸ 16 Id. 33. ⁹ 5 Id. 14.

pays rent, such payment is conclusive evidence of a tenancy; and he will be liable in an action for use and occupation for the time he occupies the premises. *Bishop v. Howard*, 2 B. and C. 100; and see post in "*Ejectment*." But where a tenant from year to year on the expiration of his landlord's title, continues in possession for one quarter, and pays rent for that quarter to the party entitled, but quits at the end of the quarter, the payment is not evidence of a tenancy for more than the quarter, and the party entitled cannot sue the tenant for use and occupation beyond the quarter. *Freeman v. Jury*, 1 M. and M. 19.

Where the defendant has entered under a contract for sale, which ultimately goes off, and his occupation has been a beneficial one, it seems that he is liable in this action, though it is otherwise when the occupation has not been beneficial; *Hearn v. Tomlin, Peake*, 192; or when the plaintiff has derived a sufficient benefit by the contract, as where he retained the purchase-money during the whole time of the occupation. *Kirtland v. Pounsett*, 2 Taunt. 145. Where the defendant contracted to sell the premises, but subsequently gained possession of them by a false representation, he was held liable during such possession for use and occupation, though at that time he was the legal owner of the freehold. *Hull v. Vaughan*, 6 Price, 157; see also *Keating v. Bulkeley*, 2 Stark. 419.* Whether the owner of land can bring use and occupation against a trespasser, waiving the tort, appears to be doubtful. See *Hambly v. Trott*, Cowp. 375; *Birch v. Wright*, 1 T. R. 387; *Foster v. Stewart*, 3 M. and S. 190; *Bennet v. Francis*, 2 B. and P. 554.

Situation of the premises.] The local situation of the premises need not be stated; but if stated, and described as situate in a wrong parish, it is a fatal variance; *Wilson v. Clark*, 1 Esp. 273, *Guest v. Caumont*, 3 Campb. 235; but where they were described as situate in the parish of *Lambeth*, the real name of the parish being *St. Mary, Lambeth*, though usually called *Lambeth*, the variance was held immaterial. *Kirtland v. Pounsett*, 1 Taunt. 570; see *Goodtill v. Walter*, 4 Taunt. 672, where it is said to be sufficient to describe premises as lying in any parish by the name by which the parish is ordinarily known; but see *Taylor v. Hooman*, 1 B. Moore, 161;† and see post, in "*Ejectment*;" see also *Taylor v. Willans*, 3 Bingh. 449, *Doe v. Carter*, 1 Y. and J. 492.

Damages.] Where a rent is mentioned in the lease or agreement, such rent will be the measure of damages, though the least be void by the statute of frauds, *De Medina v. Polson*, 4 Holt, 47;‡ but where there is no express agreement as to rent, the value of the premises must be proved; and where A. took a farm under an agreement which he never signed, and the material terms of which

* 9 Eng. Com. Law Reps. 41. † 3 Id. 411. ‡ 4 Id. 394.

• 13 Id. 46. † 3 Id. 21.

the lessor failed to fulfil, so that the defendant had not the occupation of all the land stipulated for, it was held that the jury might ascertain the value of the land, without regarding the amount of rent reserved by the agreement. *Tomlinson v. Day*, 2 B. and B. 680, 5 B. Moore, 558, S. C.

Defence.

Plaintiff's title expired.] Although the defendant cannot impeach the title of the plaintiff under whom he holds; *ante*, p. 142; yet he may show that it has expired; *Holmes v. Pontin*, Peake, 99. *Morgan v. Ambrose*, Peake's *Ev.* 277. *Gravenor v. Woodhouse*, 1 Bingham, 43;† but where the defendant had come in under the plaintiff, Lord Ellenborough held that it was not competent for him to show that the plaintiff's title had expired, unless he had at the same time solemnly renounced the plaintiff's title, and commenced a fresh holding under another person. *Balls v. Westwood*, 2 Campb. 11; and see *Neave v. Moss*, 1 Bingham, 360;‡ and *ante*, p. 143; and post, "*Replevin*," "*Evidence on plea of Non Dimisit, &c.*"

In an action by the assignee of a reversion, it is a good defence that the defendant paid the rent to the lessor before notice of the assignment. *Birch v. Wright*, 1 T. R. 378; and see *Lumley v. Hodgson*, 16 East, 99. *Moss v. Gallimore*, Dougl. 282.

Defendant's occupation determined.] An agreement that on the tenant's quitting the rent shall cease, and an acceptance of the key by the landlord or a letting of the premises by him to a third person is, as already stated, *ante*, p. 144, a sufficient defence; *Whitehead v. Clifford*, 5 Taunt. 518.* *Hall v. Burgess*, 5 B. and C. 332.* *Grammar v. Legge*, 8 B. and C. 324.† *Waller v. Atcheson*, 3 Bingham, 462,‡ stated *ante*, p. 144; but evidence that the keys of the premises were delivered by an agent of the defendant to a servant at the plaintiff's house, and that the plaintiff declared that they had been lost or mislaid is not sufficient. *Harland v. Bromley*, 1 Stark. 455.⁴ An eviction by the landlord determines the occupation; and where the premises are let at an entire rent, an eviction from some part, if the tenant gives up possession of the residue, is a complete defence; *Smith v. Raleigh*, 3 Campb. 513; but if the tenant continues in possession of the residue, he seems liable *pro tanto*; *Stokes v. Cooper*, 3 Campb. 514 (n); and an eviction of the under-tenant is an eviction of the tenant. *Burn v. Phelps*, 1 Starkie, 94.⁵ Where the defendant proved that he took possession as administrator, and that the premises had been productive of no profit to him, and that eight months after the intestate's death he had offered to surrender them to the plaintiff, this was held a good defence. *Remnant v. Bremridge*, 8 Taunt. 191.⁶ It is also a good defence that the defendant has had no beneficial use

* 6 Eng. Com. Law Reps. 315. † 8 Id. 235. ‡ 8 Id. 348. § 1 Id. 173.

• 11 Id. 246. † 15 Id. 229. ‡ 13 Id. 52. § 2 Id. 467. • 2 Id. 310. † 4 Id. 66.

and occupation, through the default of the plaintiff, as where the premises become unsafe and useless for want of repairs, the tenant not being bound to repair; in which case he is not liable in this action, though he has given no notice to quit. *Edwards v. Etherington*,¹ *R. and M.* 268.

Defendant treated by plaintiff as a trespasser.] If the landlord has treated the tenant as a trespasser, he cannot afterwards recover against him in this action. Thus if he has recovered against him in ejectment, he cannot sue in this action for the rent accruing after the day of the demise. *Birch v. Wright*, 1 *T. R.* 378. See *Bridges v. Smith*, 5 *Bingh.* 410.* But the mere bringing of an ejectment, and laying the demise before the time of the rent accruing, is no bar to an action for use and occupation. *Cobb v. Carpenter*, 2 *Campb.* 13 (n).

Statute of limitations.] The statute of limitations is a good defence, in an action against a person who has been tenant from year to year, but who has not within the last six years occupied the premises, paid rent, or done any act from which a tenancy can be inferred, though no notice to quit has been given. *Leigh v. Thornton*, 1 *B. and A.* 625.

Illegality.] It is a good defence that the premises have been occupied for an immoral purpose, with the plaintiff's knowledge. *Crisp v. Churchill*, cited 1 *B. and P.* 340; and see *Gerardy v. Richardson*, 1 *Esp.* 13. *Jennings v. Throgmorton*, *R. and M.* 251; and see post, "*Assumpsit*," "*Defence*," "*Immorality*."

ASSUMPSIT ON BILLS OF EXCHANGE.

Production and proof of the bill.] In all actions upon bills of exchange and promissory notes, it is necessary for the plaintiff to produce the bill or note, and to show that it is the same as that on which he has declared. But where it appears that the instrument has been destroyed, as where the defendant tore his own note of hand, a copy is admissible. *Anon.* 1 *Ld. Raym.* 731. The plaintiff cannot recover on a lost bill, indorsed by the payee, without proving that it has been destroyed, though he has offered an indemnity to the defendant; *Pearson v. Hutcheson*, 3 *Campb.* 211, 6 *Esp.* 126, *S. C.* *Hansard v. Robinson*, 7 *B. and C.* 90;¹ *R. and M.* 404 (n), *S. C.*; and though the bill was lost after it became due; *Poole v. Smith*, *Holt*, 144.¹ *Hansard v. Robinson*, *ubi sup.*; and an express promise to pay the lost bill will not entitle him to recover. *Davis v. Dodd*, 4 *Taunt.* 602. But where a bill is lost with only a special indorsement upon it by the payee, the indorser may re-

¹ 15 Eng. Com. Law Reps. 481. ¹ 14

¹ 3 *Id.* 55.

cover upon it, for the holder can make no title to it. *Long v. Bailie*, 2 *Campb.* 214 (n); and see *Smith v. Clarke, Peake*, 225. If the acceptor improperly detains the bill in his hands, the drawer or other party may sue him upon it, and give him notice to produce it. *Smith v. McClure*, 5 *East*, 477; and where the defendant had admitted that he owed the money due upon a bill, which was in his own possession, *Abbott, C. J.*, held that such admission might be given in evidence, under the common counts, without a notice to produce the bill. *Fryer v. Brown, R. and M.* 145.

The bill or note produced must appear to be the same upon which the plaintiff has declared, and if any material variance exist, it is a ground of nonsuit. Where a bill appears to be altered, it lies upon the party producing it to show that the alteration was not improperly made. *Henman v. Dickinson*, 5 *Bingh.* 183; ¹ see *ante*, p. 126.

Variance in names.] A variance in the names of the parties to the action will not be a ground of nonsuit, because it should be pleaded in abatement, provided the identity be proved, as where the plaintiff was called Edward instead of Edmund; *Boughton v. Frere*, 3 *Campb.* 29; so of a misnomer in the surname of plaintiff; *Jowett v. Charnock*, 6 *M. and S.* 45; and where the plaintiff is misnamed in a note, he may show by evidence that he was the person intended. *Willis v. Barrett*, 2 *Stark.* 29.¹ Where a bill is drawn with the payee's name in blank, and in the declaration it is stated that A. B. (a *bona fide* holder who has inserted his own name) was payee, it is no variance. *Atwood v. Griffin, Ry. and Moo.* 425. A variance in the christian name of the defendant is not material, if it appear that he has been served with process. *Dickenson v. Bowes*, 16 *East*, 110. But where, in an action against three makers of a note, the declaration stated it to have been made by William Austin, Robert Strobell, and William Shurtliffe, of whom the two latter were outlawed, and it appeared that the names were William Austin, Samuel Strobell, and William Shurtliffe, the variance was held fatal. No proof was given of the identity of the parties. *Gordon v. Austin*, 4 *T. R.* 611. Where the misnomer is in the name of a person not a party to the action, and cannot therefore be pleaded in abatement, it is fatal; as *John Crouch*, for *John Couch*. *Whitwell v. Burnett*, 3 *B. and P.* 559. But where a bill was stated to have been indorsed by Philip Phillip, and it appeared that his name was Philip Phillips, and that he had so indorsed the bill, Lord Ellenborough refused to nonsuit, observing that whether the name on the bill be the party's false or true name is immaterial, if it be his name of trade, and that the only question was as to the identity of the person. *Forman v. Jacob*, 1 *Stark.* 47.² Proof that other persons joined the defendant in drawing, or

¹ 15 Eng. Com. Law Reps. 409. ² 3 Id. 229. = 2 Id. 238.

accepting the bill, is immaterial under the general issue, it being matter of plea in abatement. *Mountstephen v. Brooke*, 1 B. and A. 224; see *ante*, p. 43.

As to variance in the date of a bill or note, *vide ante*, p. 50.

Variance in place of payment.] If a bill is drawn (in the body of it), payable at a particular place, it is a fatal variance to state it without that qualification. *Bayley on Bills*, 310. So where a bill is directed to "A. B. payable in London," at the foot, payment in London is part of the contract, and the omission of the qualification would be fatal. *Hodge v. Fillis*, 3 Campb. 463. And where a note contains, in the body of it, a promise to pay at a particular place, it is a variance to omit the place; *Roche v. Campbell*, 3 Campb. 247, *Sanderson v. Bowes*, 14 East, 500; but where the place of payment is only mentioned in the memorandum at the foot of a note, it is no variance to omit it; *Price v. Mitchell*, 4 Campb. 200. *Williams v. Waring*, 10 B. and C. 2; and if stated in the declaration to be made payable there, it is a variance. *Exon v. Russel*, 4 M. and S. 505; but see *Hardy v. Woodroffe*, 2 Stark. 319. *Sproule v. Legg*, 3 Stark. 157,* *semb. cont.* Where the memorandum at the foot of the note was printed, Lord Ellenborough considered the place of payment there mentioned to be part of the contract. *Tregothick v. Edwin*, 1 Stark. 468.† By stat. 1 and 2 Geo. IV. c. 78, if a person shall accept a bill payable at the house of a banker, or other place, without further expression, it shall be taken to be a general acceptance; but if he express that he accepts it at a banker's, or other place, and not otherwise or elsewhere, such acceptance shall be taken to be a special acceptance. See *Selby v. Eden*, 3 Bingh. 611,‡ *Fayle v. Bird*, 6 B. and C. 531;§ *post*, p. 152.

Variance in direction.] An allegation that the bill was directed to the defendant, is not supported by proof that the drawer drew the bill to his own order, payable at a specified place, though the defendant had accepted it. *Gray v. Milner*, 2 Stark. 336;¶ see 3 B. Moore, 90, 8 Taunt. 739,* S. C., *second action on same bill*. In an action against the acceptor upon a bill directed to him, or, in his absence, to J. S., the conditional direction to J. S. need not be stated. *Anon.* 12, Mod. 447. *Bayley on bills*, 309.

Variance in consideration.] The words "value received," in a bill payable to the drawer's order, mean value received by the drawee; and if stated to be value received by the drawer, it is a variance. *Highmore v. Primrose*, 5 M. and S. 65. *Priddy v. Henbrey*, 1 B. and C. 675.¶ But where the bill is drawn payable to the order of a third person, "for value received," it is no variance

* 3 Eng. Com. Law Reps. 363. † 14 Id. 174. ‡ 2 Id. 470. § 13 Id. 70.
 ¶ 13 Id. 246. * 3 Id. 372. † 4 Id. 265. ‡ 8 Id. 179.

to state that it was for value received of the drawer. *Grant v. Da Costa*, 3 M. and S. 351. "Value received" in a note, imports value received from the payee. *Clayton v. Gosling*, 5 B. and C. 360.* Value received in leather, for value delivered in leather, is no variance. *Jones v. Mars*, 2 Campb. 306.

Variance in statement of currency.] Where the declaration on a bill drawn in Ireland stated that it was drawn for a certain sum, without stating it to be Irish currency, which it was in fact, the variance was held fatal. *Kearney v. King*, 2 B. and A. 301. *Sprole v. Legge*, 1 B. and C. 16.*

Variance in proof of the drawing, or accepting, or indorsing.] Where the declaration stated that A. indorsed a note, *his own handwriting* being thereunto subscribed, and it appeared to have been indorsed by procuration, it was held a variance; *Levy v. Wilson*, 5 Esp. 180; but in a similar case, where it appeared that the name was written by the wife of the indorser, under his authority, Lord Ellenborough was inclined to think it enough to show the name written by an authorised agent; *Helmsley v. Loader*, 2 Campb. 450; and where the declaration stated that the defendants made their bill, "their own proper hands being thereunto subscribed," and the bill appeared to be drawn in the defendant's firm of "Mars and Co." Lord Ellenborough refused to nonsuit for the variance. *Jones v. Mars*, 2 Campb. 305. So where the averment was, as in the above case, but it appeared that the name was written by the son of the party with his authority, Lord Tenterden held it to be no variance. *Booth v. Grove*, 1 M. and M. 182. A note made by A. only, cannot be declared on as the joint note of A. and B. though given to secure a debt for which A. and B. were jointly liable. *Siffkin v. Walker*, 2 Campb. 308.

Variance in presentment.] A variance in the day of presentment is not material, in an action against the acceptor on a bill payable a given time after sight; *Forman v. Jacob*, 1 Stark. 46;† but where the time of payment depends upon the presentment, and the action is against the drawer of a bill, or indorser of a bill or note, the very day of the presentment ought to be stated. *Bayley on bills*, 317. However, where the averment is that the bill was presented *when it became due and payable*, to wit, on &c., it is not necessary to prove the exact day laid under the *videlicet*, and therefore if it be a Sunday, it is immaterial. *Bynner v. Russel*, 1 Bingh. 23,‡ 7 B. Moore, 286, S. C. And if a presentment by a certain person is alleged, a presentment by another may be proved. *Boehm v. Campbell*, 1 Gow, 55.*

* 11 Eng. Com. Law Reps. 252. † 8 Id. 11. ‡ 2 Id. 288. § 8 Id. 230.

§ 5 Id. 459.

If the word "at" be inserted before the name of the drawee, it is no variance to state that the bill was drawn on the drawee. *Shuttleworth v. Stephens*, 1 Campb. 407; and see *Russ. and Ry. C. C. R.* 511, *Allen v. Mawson*, 4 Campb. 115. Where an instrument was in this form—"Three months after date I promise to pay, &c.

"J. B. Grutherot, John Bury.
"35, Montague-place, (Indorsed) John Bury."
It was held that the holder might treat this as a promissory note, or (Per *Ld. Tenterden*, *Bayley*, and *Holroyd*, J. J.) as a bill of exchange at his election. *Edis v. Bury*, 6 B. and C. 433.*

Payee against Acceptor.

The plaintiff must produce the bill and prove the acceptance by the defendant, and if such acceptance is conditional, that the condition has been performed.

Acceptance in writing or parol.] By stat. 1 and 2 Geo. IV. c. 78, no acceptance of any inland bill of exchange shall be sufficient to charge any person, unless the acceptance be in writing on the bill, or if there be more than one part of the bill, on one of the parts. But in the case of foreign bills, a parol acceptance, or an acceptance by a collateral writing, is still sufficient. A letter, stating that such a bill "shall meet with due honour," is an acceptance, *Clarke v. Cock*, 4 East, 57, or that the holder "may rest satisfied as to payment." *Wilkinson v. Lutwidge*, 1 Str. 649; see also *Wynne v. Raikes*, 5 East, 514. "What! not accepted? We have had the money, and they ought to be paid; but I do not interfere in this business, you should see my partner," held to be an acceptance. *Fairlee v. Herring*, 3 Bingh. 625.* "Your bill shall have attention," is not an acceptance, *Rees v. Warwick*, 2 B. and A. 113, and a promise to pay a non-existing bill, is no acceptance, *Johnson v. Collins*, 1 East, 98, unless perhaps some person be thereby induced to take or retain the bill. *Ibid.* *Pillans v. Van Meirap*, Burr. 1663. *Pierson v. Dunlop*, Cowp. 571. *Bayl. on bills*, 144.

Acceptance, absolute or conditional.] If the acceptance is conditional, a performance of the condition must be alleged and proved, *Swan v. Cox*, 1 Marsh. 176, or if the condition has not been performed, a legal excuse must be averred and proved.

Acceptance, general or special.] An acceptance at a banker's or other place is only a general acceptance, but an acceptance at a banker's or other place only, and not otherwise, or elsewhere, is a qualified acceptance, and a presentment of the bill there must be

* 13 Eng. Com. Law Reps. 227. * 13 Id. 78.

stated and proved. 1 and 2 Geo. IV. c. 78. A bill which is drawn payable at a particular place, is within this statute, and unless the acceptance is a special one within the act, it is not necessary to aver or prove a presentment at the particular place, it being held that there is no distinction between the case where the bill is so rendered payable by the language of the drawers, and the case where it is accepted so payable by the language of the acceptor. *Selby v. Eden*, 3 Bingh. 811.^c *Fayle v. Bird*, 6 B. and C. 531.^d In the case of a general acceptance, it is not necessary to aver or prove a presentment; *Turner v. Hayden*, 4 B. and C. 1;^e but if the acceptance is qualified, the plaintiff must aver and prove presentment at the place named, *Rowe v. Young*, 2 B. and B. 165,^f though in the latter case notice of non-payment to the acceptor is unnecessary; *Treacher v. Hinton*, 4 B. and A. 413.^g The holder need not present a bill, specially accepted, at the place named, on the very day it becomes due, provided the money is not lost by such neglect. *Rhodes v. Gent*, 5 B. and A. 244.^h And where, since the stat. 1 and 2 Geo. IV. c. 78, a bill is accepted payable at a banker's, without saying, "and not otherwise or elsewhere," which is a general acceptance, and the holder neglects to present it, and the bankers fail with money of the acceptor in their hands, the acceptor is not thereby discharged. *Turner v. Hayden*, B. and C. 1.^e

Acceptance, how proved.] The acceptance, if written, is proved by evidence of the acceptor's hand-writing, and if there is an attesting witness, by calling him. If several, not partners, are acceptors, the hand-writing of each must be proved. *Gray v. Palmers*, 1 Esp. 135. If one of several partners accept a bill drawn on the firm, it is sufficient to prove the partnership, and his hand-writing, in an action against all; *Mason v. Rumsey*, 1 Campb. 384; but it is a good defence that the plaintiff had notice, that the firm would not be bound by such an acceptance. *Galway v. Smithson*, 10 East, 264, or that the bill was not accepted for partnership purposes, and that there is covin between the partner who accepts and the plaintiff. *Sherriff v. Wilkes*, 1 East, 48.. *Green v. Deakin*, 2 Stark. 347.ⁱ But in the absence of fraud or collusion a party who has received a bill, given by one of several partners for his separate debt, may sue the partnership on such bill. *Swan v. Steele*, 7 East, 210. *Ridley v. Taylor*, 13 East, 175. *Baker v. Charlton*, Peake, 80. In an action against A. and B. as acceptors, if A. pleads a plea which admits his signature, yet it must still be proved as against B. *Gray v. Palmers*, 1 Esp. 135. If the acceptance is by agent, his authority and hand-writing must be proved, and the agent himself is a competent witness to prove the authority. If the authority was in writing it should be produced

• 13 Eng. Com. Law Reps. 70. • 13 Id. 246. • 10 Id. 250. • 6 Id. 53.
• 6 Id. 468. • 7 Id. 84. • 13 Id. 377.

and proved. *Johnson v. Mason*, 1 Esp. 96. If the defendant acknowledges his handwriting, or promises to pay, *Jones v. Morgan*, 2 Campb. 474, or pays part, *Vaughan v. Fuller*, 2 Str. 1246, it is an admission, and dispenses with the proof of the acceptance. An admission by one of several acceptors, not partners, is not evidence against the rest; *Gray v. Palmers*, 1 Esp. 135; but after a partnership is established, the admission of the partner who accepted the bill will be proof of the acceptance against all, *Hodenpyl v. Vingerhoed*, *Chitty on bills*, 489, 5th ed., see ante, p. 30, and an admission by one partner of his partnership with his co-defendants, who had been outlawed, was held to be sufficient proof of the partnership as against him. *Sangster v. Mazzarredo*, 1 Stark. 161.* If the acceptor, on being applied to for payment, desire the party to call again, it will not prevent him from proving the acceptance a forgery, but it is otherwise if he has adopted the acceptance, as by paying other bills of the same kind, *Barber v. Gingell*, 3 Esp. 60, or acknowledging the handwriting to be his. *Leach v. Buchanan*, 4 Esp. 226.

Where in an action against the acceptor of a bill, his attorney gave a notice to produce all papers relating to a bill described as the bill in question, "accepted by the said defendant," the notice was held to be *prima facie* evidence of the acceptance. *Holt v. Squire, R. and M.* 282.

Some evidence of the identity of the defendant and the person who has accepted the bill is necessary, and it is not sufficient merely to prove that a person, calling himself by the same name, accepted the bill. *Bull. N. P.* 171. *Middleton v. Sandford*, 4 Campb. 34. *Perkins v. Hawkshaw*, 2 Stark. 239;† see *Bulkeley v. Buller*, 2 B. and C. 441,‡ post, p. 155, *Roach v. Ostler*, 1 M. and R. 120.

Acceptance, effect of.] An acceptance admits the handwriting of the drawer, and if drawn by procuration, the procuration, *Robinson v. Yarrow*, 7 Taunt. 455,§ *Porthouse v. Parker*, 1 Campb. 82, and the acceptor cannot say that the drawer's name is forged. *Smith v. Chester*, 1 T. R. 655, *Bass v. Clive*, 4 M. and S. 15. So if the bill was drawn in the name of a firm, the acceptor cannot object that it was drawn by a single person, *Bass v. Clive*, 4 M. and S. 13, nor can he set up the drawer's inability, as that he was an infant. *Taylor v. Croker*, 4 Esp. 187.

Evidence under common counts.] If the payee is also the drawer, the bill will be evidence under the count for money had and received, *Thompson v. Morgan*, 3 Campb. 101, or under the count on an account stated; *Per Abbott, C. J.*, *Rhodes v. Gent*, 5 B. and A. 245;¶ and it is said to be *prima facie* evidence of money had and received by the acceptor to the use of the holder; *Bayley*

* 2 Eng. Com. Law Reps. 338. † 3 Id. 332. ‡ 9 Id. 133. § 2 Id. 173.

¶ 7 Id. 84.

on bills, 287, 4th ed.; but this does not appear to be law unless between immediate parties. *Bentley v. Northouse*, 1 M. and M. 66, *Waynam v. Bend*, 1 Campb. 175. An acknowledgment of the debt by the defendant will enable the holder to recover upon the count on an account stated. *Highmore v. Primrose*, 5 M. and S. 65.

Indorsee against acceptor.

In an action by the indorsee against the acceptor, the plaintiff must prove the acceptance (which admits the drawing of the bill, *vide supra*), and secondly, the indorsements stated in the declaration.

Indorsement, how proved.] None of the indorsements are admitted by the acceptance, *Smith v. Chester*, 1 T. R. 654, and even where the bill is payable to the drawer's order, his handwriting as indorser must be proved, though his name was on the bill at the time of acceptance. *Bosanquet v. Anderson*, 6 Esp. 43. So where a bill drawn payable to the drawer's own order, was drawn and indorsed by procuration, by the same person, it was held that the acceptance only admitted the drawing by procuration, and not the indorsement by procuration. *Robinson v. Yarrow*, 7 Taunt. 455.* But in an action against the acceptor of a bill, drawn in favour of A. and B., and indorsed by A. in the name of A. and B., and afterwards accepted by the defendant, on it being objected that the payees were not partners, and that, therefore, the indorsement was irregular, Lord Ellenborough is said to have held, that after acceptance, the defendant could not dispute the regularity of the indorsement; *Jones v. Radford*, 1 Campb. 83 (n), *sed quære*, for it is said by Lord Ellenborough, in another case, that though the drawee accept the bill with many names on it, if laid in the declaration, they should be proved. *Bosanquet v. Anderson*, 6 Esp. 43. Where there was no proof of the handwriting of one of the indorsers, but it appeared that the indorsement was upon the bill when the defendant accepted it, and that he promised to pay it, *Ryder, C. J.*, left the case to the jury, who found for the plaintiff, and the court refused a new trial. *Hankey v. Wilson*, Say. 223. *Bayley on bills*, 367. And where a bill was shown to the drawer with the name of the payee indorsed upon it, and the drawer merely objected the want of consideration, it was ruled that it did not supersede the necessity of proving the indorser's handwriting. *Duncan v. Scott*, 1 Campb. 101. An offer made by the acceptor to pay a bill, with certain names on it, is a sufficient admission of the plaintiff's title so as to supersede the necessity of proof of each person's handwriting. *Bosanquet v. Anderson*, 6 Esp. 45; see also *Sidford v. Chambers*, 1 Stark. 320.⁴ An admission of his handwriting by the indorser, though evidence against himself, is not evidence in an action

against the acceptor. *Hemmings v. Robinson, Barnes, 436. Bayl. on bills, 379, 4th ed. ; but see Maddocks v. Hankey, 2 Esp. 647.*

It must appear that the indorsements were made by the persons by whom they purport to have been made. *See ante, p. 67, as to identity.* In an action by an indorsee against the acceptor of a bill of exchange whereof E. S. was the payee, the plaintiff proved, that a person calling himself E. S. came to C., having in his possession the bill in question, and also a letter of introduction proved to be genuine, which was expressed to be given to a person introduced to the writer as E. S., and also another bill of exchange, drawn by the writer of that letter. The bearer of these documents, after remaining ten days at C., during which time he daily visited the plaintiff, indorsed to him the bill in question and received value for it, and also a letter of credit. This was held to be evidence of the identity of this person with E. S. in the absence of any evidence in answer. *Bulkeley v. Butler, 2 B. and C. 434.**

What indorsements are good.] If the payee has delivered over the bill without indorsement, for a valuable consideration, and afterwards becomes bankrupt, he may indorse it notwithstanding his bankruptcy. *Smith v. Pickering, Peake, 50.* So the drawer of a bill payable to his own order, and accepted for his accommodation, may indorse it after his bankruptcy, for it does not pass to his assignees. *Wallace v. Hardacre, 1 Campb. 46. Arden v. Watkins, 3 East, 317.* An indorsement by a feme covert, of a bill payable to her order, in her own name, conveys no interest. *Barlow v. Bishop, 1 East, 482,* unless from circumstances the jury can infer an authority from her husband to her to indorse it in such name, as if he promise to pay the bill. *Id. 434. Cotes v. Davis, 1 Campb. 485.* Infancy being a personal privilege, the acceptor cannot set up the infancy of the indorser as a defence. *Taylor v. Croker, 4 Esp. 187, recog. 2 B. and C. 299 ;* and see Jones v. Darch, 4 Price, 300.* On the death of the holder, his executor or administrator may indorse. *Rawlinson v. Stone, 3 Wils. 1.* Unless the persons indorsing are in partnership, the indorsement of each must be proved; *Carvick v. Vickery, Dougl. 653 (n) ;* but if a partnership be proved, an indorsement by one of the partners, in the partnership name, is sufficient, *vide supra.* On the dissolution of a partnership, a power given to one of the partners to receive and pay debts, does not authorise him to indorse a bill in the name of the partnership. *Kilgour v. Finlayson, 1 H. Bl. 155. See Dolman v. Orchard, 2 C. and P. 104.* Lacy v. Woolcot, 2 D. and R. 458.** And if one of several partners who have a right to indorse becomes bankrupt and indorses the bill, such an indorsement, though made to a creditor of the firm, will confer no title; *Thomason v. Frere, 10 East, 418 ; see Drayton v. Dayle, 2 B. and C. 293 ;** but where the partners hold the bill as trustees, and one of them becomes bankrupt, he and the

*9 Eng. Com. Law Reps. 133. *9 Id. 94. *12 Id. 47. *16 Id. 101. *9 Id. 91.

rest may indorse. *Ramsbottom v. Cator*, 1 Stark. 228.* On a bill payable to A., for the use of B., the right to transfer is in A. *Evans v. Cramlington*, Carth. 5; but see *Sigourney v. Lloyd*, 8 B. and C. 631.†

What indorsements need be proved.] If all the indorsements have been stated, though unnecessarily, they must, it seems, be proved; *Waynam v. Bend*, 1 Campb. 175, *Bosanquet v. Anderson*, 6 Esp. 43; but where the first indorsement is in blank, the plaintiff may state an indorsement from the payee to himself immediately, though there be intermediate special indorsements, and it will only be necessary to prove the first indorsement. *Smith v. Clarke, Peake*, 225. In an action by the indorseees of a bill against the acceptor, the first count stated all the indorsements, the second count an indorsement by the payee to the plaintiff; *Abbott*; C. J., said, that all the indorsements must be proved or struck out, though not stated in the declaration. "I remember," said his Lordship, "Mr. Justice Bayley so ruling, and striking them out himself at the trial; and this need not be done before the trial." *Cocks v. Borrodale, Chitty*, 392, 7th ed.

Title of the plaintiffs as indorseees.] When a bill is indorsed in blank, possession is a sufficient *prima facie* title,* and several plaintiffs suing as indorseees need not prove that they are in partnership, or that the bill was indorsed to them jointly; *Ord v. Portal*, 3 Campb. 239; *Rordasz v. Leach*, 1 Stark. 446;† and see *Marchell v. Kinnear*, 1 Stark. 499;‡ *Attwood v. Rattenbury*, 6 B. Moore, 579;§ but where it is specially indorsed to a firm, the partnership of the plaintiffs must be proved; 3 Campb. 240; and where the plaintiffs sue in a particular capacity, as assignees of a bankrupt for instance, they must prove that the bills were indorsed to them in that capacity. *Bernasconi v. Duke of Argyle*, 3 C. and P. 29.¶

Evidence under the money counts.] An acceptance is said to be evidence of money had and received by the acceptor to the use of the holder; *Bayley on Bills*, 287; and it has therefore been supposed, that in an action by an indorsee against an acceptor, the bill may be given in evidence under the count for money had and received. 2 Phil. Ev. 30. But late authorities show that it is only where the bill or note is enforced between immediate parties, that the plaintiff can recover on the count for money had and received. *Waynam v. Bend*, 1 Campb. 174. *Exon v. Russell*, 4 M. and S. 507. *Thompson v. Morgan*, 3 Campb. 101. *Wells v. Girling, Gow*, 22,¶

* 2 Eng. Com. Law Reps. 367. † 15 Id. 319. ‡ 2 Id. 463.

§ 2 Id. 484. ¶ 17 Id. 61. † 14 Id. 195. ‡ 5 Id. 445.

* The possession of a bill by an indorsee who had indorsed it over to another, is *prima facie* evidence that he is the proprietor of the bill, notwithstanding there may be on it one or more indorsements, subsequent to the indorsement to him, without his producing any recital or indorsement back from either of the subsequent indorsers. *Dugan v. U. States*, 3 Wheat. 172.

3 B. Moore, 79. *Bently v. Northouse*, 1 M. and M. 66. *Eales v. Dicker*, 1 M. and M. 324.

Drawer against Acceptor.

When a bill, not payable to the drawer's order, has been dishonoured and taken up by the drawer, the latter may sue the acceptor, and in such action must prove, 1. The acceptance, (*vide ante*, p. 152); 2. The presentment to the defendant, and his refusal, which may be done by calling the person who presented the bill, or by proving a promise to pay by the defendant, which dispenses with proof of the presentment; and 3. The payment of the bill by the plaintiff. To prove the latter fact, it is not sufficient to produce the bill with a receipt on the back of it, as from the then holder, for the receipt *prima facie* imports that the bill was paid by the acceptor. *Scholy v. Walsby*, Peake, 24. It will not be necessary for the plaintiff, in the first instance, to prove that the defendant had effects of the plaintiff in his hands, the acceptance being sufficient *prima facie* evidence of that fact. *Vere v. Lewis*, 3 T. R. 183. The bill may be given in evidence under the count for money had and received, where it is payable to the order of the drawer. *Thompson v. Morgan*, 3 Campb. 101, *ante*, p. 153.

Payee against Drawer.

In an action by the payee against the drawer, the plaintiff must prove, 1. The drawing of the bill; 2. Presentment to the drawee or acceptor; 3. His default; 4. Notice to the defendant of the dishonour.

The drawing of the bill.] The drawing of the bill must be proved by evidence of the drawer's handwriting, *see ante*, p. 68; or if drawn by an agent, by proving the authority of the agent. If drawn in the name of a partnership, the partnership must be proved, and the handwriting of the partner who drew the bill, *see ante*, p. 152.

Presentment to the drawer or acceptor.] A presentment for acceptance is not necessary, except in cases of bills payable within a limited time after sight, *Bayley on bills*, 182; but if presented and refused acceptance, notice of such refusal must be given, *Goodall v. Dolley*, 1 T. R. 712, though the drawer of a bill is not discharged by want of notice of non-acceptance where the bill has passed into the hands of a *bona fide* indorsee for value, who has no knowledge of the dishonour. *Dunn v. O'Keefe*, 5 M. and S. 282. Where the bill is payable at a certain date, and not presented for acceptance,

a presentment for payment on the last day of grace must be proved; *Tassel v. Lewis*, 1 *Ld. Raym.* 743. *Bayley on bills*, 198; but where it is payable at a certain time after sight, or at sight, it need only be presented within a reasonable time; which has been held to be, though the authorities differ on the point, a question for the jury; *Muilman v. D'Eguino*, 2 *H. Bl.* 565, *Fry v. Hill*, 7 *Taunt.* 397;⁴ see the cases *Bayl. on bills*, 187; or rather a mixed question of law and fact. *Shute v. Robins*, 1 *M. and M.* 133. If a bill drawn at three days' sight were put into circulation, and kept out in that way for a year, it would not, as it seems, be laches; but if the holder were to lock it up for any length of time, it seems he would be guilty of laches. Per Buller, *J. Muilman v. D'Eguino*, 2 *H. Bl.* 565. Where a bill drawn by the defendant at one month after sight, on London, was delivered to the plaintiff on the 9th, at Windsor, and was presented on the 13th, and the jury found a verdict for the plaintiff, the court of C. P. refused to disturb the verdict. *Fry v. Hill*, 7 *Taunt.* 397.⁴

A distinction has been taken with respect to bills payable after sight, drawn by bankers in the country on their correspondents in London. "It does not seem unreasonable," says Lord Tenterden, "to treat bills of this nature as not requiring immediate presentment, but as being retainable by the holders for the purpose of using them within a moderate time (for indefinite delay of course cannot be allowed) as part of the circulating medium of the country." *Shute v. Robins*, 1 *M. and M.* 133.

Bills due on a Sunday or Christmas-day; *Tassell v. Lewis*, 1 *Ld. Raym.* 743; or on a Good-Friday, 39 and 4 *Geo. III. c. 42*; or on a fast day, 7 and 8 *Geo. IV. c. 15*; are to be presented on the day next before those respective days.

Presentment must be proved, although the acceptor has become bankrupt, *Russel v. Langstaffe*, *Dougl.* 518, or insolvent, *Esdaile v. Sowerby*, 11 *East*, 117, *Rohde v. Proctor*, 4 *B. and C.* 523,⁵ and where he is dead it must be made to his executor or administrator, or if there be none, at the house of the deceased. *Molloy, b. 2, c. 10, s. 34. Chitty on bills*, 317, 5th ed. If the bill is payable at a particular place, it is not necessary to present it to the executor. *Philpot v. Bryant*, 3 *C. and P.* 244.⁶ Where a bill is accepted by an agent, the drawee being abroad, presentment to the agent must be proved. *Philips v. Astling*, 2 *Taunt.* 206.

A bill payable at a banker's must be presented within banking hours; *Elford v. Teed*, 1 *M. and S.* 28; but if presented after, and a servant stationed at the banking-house return for answer, "No orders," it is sufficient. *Garnett v. Woodcock*, 6 *M. and S.* 44. *Henry v. Lee*, 2 *Chitty*, 125.⁷ Presentment at eight in the evening, at the house of a merchant, is good. *Barclay v. Bailey*, 2 *Campb.* 537.

⁴ 2 Eng. Com. Law Reps. 152. ⁵ 10 Id. 379. ⁶ 14 Id. 288. ⁷ 18 Id. 273.

Presentment to a banker's clerk at the clearing-house, is a presentment at the banker's. *Reynolds v. Chettle*, 2 Campb. 595.

If a bill or note is made payable at a particular house, that house is the proper place at which to make the presentment, whether such house be mentioned in the body of the bill or note, or in a marginal note only, or in the acceptance only. *Bayley on bills*, 174, citing *Ambrose v. Hopwood*, 2 Taunt. 61, *Garnett v. Woodcock*, 1 Stark. 475.^a Although since the stat. 1 and 2 Geo. IV., c. 78, the holder of a bill accepted payable at a banker's (not saying, and not otherwise, &c.) is not obliged, in order to charge the acceptor, to present it for payment there, *Turner v. Hayden*, 4 B. and C. 2.¹ *Bayley on bills*, 178, yet a presentment there, and refusal, with notice, will it seems be sufficient to charge the drawer. See *Mackintosh v. Haydon, R. and M.* 363.

Presentment, proof of, when dispensed with.] Payment of part of the money due upon a bill or note, or a subsequent promise to pay, with knowledge that the bill has not been duly presented, will be evidence of presentment under the usual averment. *Taylor v. Jones*, 2 Campb. 106. *Lundie v. Robertson*, 7 East, 231. So unavoidable accident will excuse a regular presentment. "*Duly presented*, is presented according to the custom of merchants, which necessarily implies an exception in favour of those unavoidable accidents which must prevent the party from doing it within the regular time." *Per Ld. Ellenborough, Patience v. Townley*, 2 Smith, 224. The mere knowledge on the part of the drawer or indorser of a bill, that the bill when presented is likely to be dishonoured, will not dispense with the presentment. *Prideaux v. Collier*, 2 Stark. 57.^a

Default of drawee or acceptor.] If the action is brought on a refusal to accept, it is sufficient for the plaintiff to show that the drawee refused to accept it generally, or according to the terms of the bill. *Bohem v. Garcias*, 1 Campb. 425 (n). It is not sufficient to show that the bill was presented to some person on the drawee's premises who refused to accept it, without connecting that person with the drawee. *Cheek v. Royer*, 5 Esp. 175. The refusal to accept, or pay, may be proved by the person who presented the bill for acceptance or payment.

Notice of dishonour.] There is no prescribed form of notice, but a mere demand of payment, without notice of the dishonour, is not sufficient. *Hartley v. Case*, 4 B. and C. 339;¹ see *Margesson v. Noble*, 2 Chitty's R. 364.^m A written notice is not required. *Crosse v. Smith*, 1 M. and S. 545. Notice to the drawers, by sending to their counting-house during the hours of business on two

^a 2 Eng. Com. Law Reps. 473. ¹ 10 Id. 259. ² 3 Id. 242. ³ 10 Id. 350.

^m 18 Id. 368.

successive days, knocking there, and making noise sufficient to be heard by persons within, and waiting there several minutes, the inner door of the counting-house being locked, is sufficient, without leaving a notice in writing, or sending by the post, though some of the drawers live at a small distance from the place. *Ibid.*

By whom given.] It is sufficient if the defendant has had notice of the dishonour of the bill, from any person who is party to it, *Jameson v. Swinton*, 2 *Campb.* 373, *Wilson v. Swabey*, 1 *Stark.* 34,* *Rosher v. Kiernan*, 4 *Campb.* 87, *Gunson v. Metz*, 1 *B. and C.* 192, though it was formerly thought that the notice must come from the holder; *Tindall v. Brown*, 1 *T. R.* 167; but notice given by a person not party to the bill, without any authority, is not sufficient, *Stewart v. Kennett*, 2 *Campb.* 177.

To whom notice should be given.] Where the holder of a bill is desirous of suing all the parties to it, he should give notice to all, for if he only gives notice to his immediate indorsers, &c., it is possible that such notice may not be regularly transmitted to the prior parties who may consequently be discharged. But if he give notice to his immediate indorser, and he, in due time, to his indorser, and so on to the drawer, the holder may sue all or any of such parties, and it is no objection in such case that there was no notice immediately from the plaintiff to the defendant. *Bayley on bills*, 209. *Rosc. Dig. Bills*, 198. The bankruptcy of the drawer does not dispense with proof of notice. Where notice was given to a bankrupt drawer, before the appointment of assignees, it was held sufficient. *Ex parte Moline*, 19 *Ves.* 216. Where the drawer had become bankrupt and absconded, but his house remained open in the possession of the messenger, and no notice was given to the drawer, or left at his house, or given to the assignees, the drawer's estate was held to be discharged. *Rohde v. Procter*, 4 *B. and C.* 517.† Where the drawer is dead, notice should be given to his executors or administrators. *Chitty on bills*, 295, 5th ed. Where the drawers are in partnership, a notice to one is a notice to all; and, therefore, where a bill is drawn by a firm upon one of that firm, and dishonoured, notice of the dishonour need not be given to the firm. *Porthouse v. Parker*, 1 *Campb.* 82. Where the indorser of a dishonoured bill was abroad in Jamaica, but had a house in England, and notice was sent to his house, and the bill was shown to his wife who was informed of the non-payment, Lord Kenyon held it sufficient. *Cromwell v. Hynson*, 2 *Esp.* 511. Where a substituted bill has been given and dishonoured, and the plaintiff sues on the first bill, he need only prove the dishonour, and not notice of the dishonour of the substituted bill. *Bishop v. Rowe*, 3 *M. and S.* 362. Notice of the drawer's attorney is not sufficient. *Cross v. Smith*, 1 *M. and S.* 554.

* 2 *Eng. Com. Law Reps.* 283. • 8 *Id.* 58. † 10 *Id.* 397.

Time within which notice must be given.) The general rule with regard to inland bills is, that where the parties do not reside in the same town, it is sufficient to send notice by the post of the day following that on which the party receives intelligence of the dishonour. *Williams v. Smith*, 2 B. and A. 497. Where there is a post on the day on which the party who is to forward it receives the notice, and no post on the following day, it is sufficient to forward the notice by the post of the third day. *Geill v. Jeremy*, 1 M. and M. 61. If the parties reside in the same town, notice must be given before the expiration of the day after that on which it has been received. *Smith v. Mullett*, 2 Campb. 208. Where the party receives notice on a Sunday, Good Friday, or Christmas-day, he is in the same situation as if it did not reach him till the next day. *Bray v. Hadwen*, 5 M. and S. 68, *Bayl. on bills*, 220, 221, 4th ed. And where a bill is payable; either by 39 and 40 Geo. III. c. 42 (*ante*, p. 158,) or otherwise on the day preceding Christmas-day, Good Friday, Thanksgiving-day, or Fast-day, it is not necessary for the holder to give notice until the day next after such Christmas-day, &c. 7 and 8 Geo. IV. c. 15. A Jew is not obliged to forward notice on the day of a grand Jewish religious festival. *Lindo v. Unsworth*, 2 Campb. 602. If the holder place the bill in the hands of his banker, the latter is only bound to give notice to his customer in like manner as if he were himself the holder, and the customer has the same time to communicate the notice as if he had received it from the holder. *Haynes v. Berks*, 3 B. and P. 599. *Bayley on bills*, 222. *Langdale v. Trimmer*, 15 East, 291. Where laches is once incurred, the drawer is discharged, though he receive notice at the time within which, had each person regularly transmitted notice to another, he would have received it. *Turner v. Leach*, 4 B. and A. 451, *Marsh v. Maxwell*, 2 Campb. 210 (n).

A notice on the day on which the bill becomes due is not too soon; for though payment may still be made within the day, non-payment on presentment is a dishonour. *Burridge v. Manners*, 3 Campb. 193, unless the acceptor afterwards, and on the same day, pays the bill. *Hartley v. Case*, 1 Carr. and P. 558.

Delivery of notice, proof of.] It is sufficient proof of the delivery of the notice, to show that it was sent in a letter by the post, without proving that the letter was received, *Saunderson v. Judge*, 2 H. B. 509, and in London, by the two-penny post, *Scott v. Lifford*, 9 East, 347, provided the delivery be on the day on which notice should be given, *Smith v. Mullett*, 2 Campb. 208. If a note is sent by post, the direction of the letter must not be too general, as "Mr. Haynes, Bristol;" *Walter v. Haynes*, R. and M. 149; but where the bill was dated "Manchester," *Abbott*, C. J., held that it wa

sufficient to direct a letter to the drawer at "Manchester," generally. *Mann v. Moors, R. and M.* 249. Where, to prove the sending of a notice by post, the plaintiff's clerk was called, who stated that a letter containing the notice was sent by post on a Thursday morning, but he had no recollection whether it was put in by himself or another clerk, it was held that this was not sufficient evidence of the putting into the post. *Hawkes v. Salter*, 4 Bingham 715.* It is not essential that notice should be sent by the post, a private conveyance is sufficient. *Bancroft v. Hall, Holt*, 476.* If there is no post, the notice may be sent by the ordinary mode of conveyance, as in case of a foreign bill, by the first regular ship bound for the place where notice is to be given. *Muilman v. D'Eguino*, 2 H. B. 565. In proving a notice sent by post, it was ruled by Lord Ellenborough not to be sufficient to show that it was contained in a letter, which letter was put upon a table for the purpose of being carried to the post, and that, in the course of business, all letters deposited on that table were carried to the post; but perhaps it might have been sufficient had the person who was in the habit of carrying the letters to the post been called, and stated that he invariably carried all such letters to the post. *Hetherington v. Kemp*, 4 Campbell 193. Proof that the notice was left with a person at the house where the defendant lodged, and that the next morning the notice was thrown into the plaintiff's house by a person unknown, is sufficient. *Stedman v. Gooch*, 1 Esp. 5.

Contents of notice, how proved.] Where a written notice has been given, but no duplicate or copy kept, it is not requisite to give a notice to produce the notice of dishonour. Le Blanc, J. admitted parol evidence of the contents, without a notice to produce, and the court refused a new trial. *Ackland v. Pearce*, 2 Campbell 601, *Kine v. Beaumont*, 3 B. and B. 288;† 7 B. Moore, 112, S. C. *Colling v. Treweek*, 6 B. and C. 394;‡ but see *Langdon v. Hulls*, 5 Esp. 156, *Shaw v. Markham, Peake*, 165. And where a duplicate original or copy of the notice has been kept, it is good evidence, without a notice to produce; *Kine v. Beaumont*, 3 B. and B. 288;† and proof that duplicate notices of dishonour were written, and that a letter (the witness could not state the contents) was sent on the same day by the plaintiff to the defendant, is sufficient, a notice to produce the letter having been served. *Roberts v. Bradshaw*, 1 Stark. 28;§ see 3 B. and B. 290.¶ But where, in an action against the indorser of a bill, it became necessary to prove that notice of the dishonour of other bills had been given to the defendant, for which purpose examined copies of letters containing such notices were offered, Abbott, C. J., ruled that a notice to produce such letters was necessary, and that the case did not fall within the exception of

* 15 Eng. Com. Law Reps. 125. † 3 Id. 160. ‡ 7 Id. 440.

§ 13 Id. 208. ¶ 2 Id. 281.

bills produced, and the subject-matter of the action where no notice is necessary. *Lanauze v. Palmer*, 1 *M. and M.* 31.

Protest.] In case of a foreign bill, notice without a protest is not sufficient, unless the party to whom notice is given resides in this country. *Robins v. Gibson*, 1 *M. and S.* 288, though he should happen at the time of the dishonour to be absent. *Cromwell v. Hynson*, 2 *Esp.* 511. In case of an inland bill, a protest is of no effect. *Windle v. Andrews*, 2 *B. and A.* 696. The production of the instrument, when made abroad, is sufficient proof of the protest. *Anon.* 12. *Mod.* 345. A protest made in England must, it is said, be proved by the notary who made it, and by the subscribing witness, if any. *Chitty on bills*, 405, 7th. ed. The presentment of a foreign bill in this country must be proved as if it were an inland bill, and the protest is not evidence of it. *Chesmer v. Noyes*, 4 *Campb.* 129.

Notice, when proof of, excused.] The plaintiff will not be obliged to give evidence of notice to the drawer, where the latter has no effects in the hands of the drawee or acceptor, or where the drawer has, with a knowledge of the dishonour, acknowledged his liability, or where the plaintiff has been unable to discover the residence of the drawer, so as to give him notice. *See post.*

Notice excused, no effects.] Proof that the drawer had no effects, nor any ground to expect any in the hands of the drawee, from the time the bill was drawn until it became payable, and that he had no other valid foundation to expect payment by the drawee, is sufficient, at least *prima facie*, to show that the drawer would be entitled to bring no action on paying the bill, and has, therefore, no right to insist on the want of notice, *Bayley on bills*, 238, citing *Rogers v. Stephens*, 2 *R. T.* 713, *Bickerdike v. Bollman*, 1 *T. R.* 405, *Legge v. Thorpe*, 12 *East*, 171, or in case of a foreign bill, of protest. *Legge v. Thorpe*, 3 *Campb.* 310, 12 *East*, 171. If the drawer had effects on the way to the drawee, notice must be proved. *Rucker v. Hiller*, 3 *Campb.* 217, 16 *East*, 43, 12 *East*, 175. So if the drawer had effects in the drawee's hands, at the time when the bill was drawn, he is entitled to notice, though at the time the bill was presented for acceptance, and thence until presentment for payment, he had not any. *Orr v. Maginnis*, 7 *East*, 359. So, though there were no effects at the time the bill was drawn or accepted, if there were when it became due; the whole period must be looked to, from the drawing of the bill till it is due, and notice is requisite if the drawee has effects at any time during that interval. *Hammond v. Dufresne*, 3 *Campb.* 145. *Thackray v. Blackett*, 3 *Campb.* 164. So if the drawer has effects in the hands of the drawee, though he is indebted to the drawee greatly

beyond that amount. *Blackan v. Doren*, 2 Campb. 503. So where the drawer has effects in the hands of the drawee, though to less amount than the bill. *Thackray v. Blackett*, 3 Campb. 164; but see *Smith v. Thatcher*, 4 B. and A. 200.* So where there is a running account between the drawer and drawee, and a fluctuating balance between them, and the drawer has reasonable grounds to expect that he shall have effects in the drawee's hands when the bill becomes due, per *Ld. Ellenborough*, *Brown v. Maffey*, 15 East, 221; or where the bill is drawn in the fair and reasonable expectation that in the ordinary course of mercantile transactions it would be accepted or paid; per *Le Blanc, J.*, *Claridge v. Dalton*, 4 M. and S. 231; and see *France v. Lucy, R. and M.* 342; or where the acceptor has received from the drawer his acceptances, upon which he has raised money, and some of which are outstanding, *Spooner v. Gardiner, R. and M.* 84, notice must be proved; and in general where the drawer would have any remedy over against a third person, as in the case of a bill drawn for the accommodation of an indorsee, notice must be given to the drawer; *Cory v. Scott*, 3 B. and A. 623.² *Norton v. Pickering*, 8 B. and C. 610;⁷ or where the drawer has reasonable grounds to expect that the acceptor, or some one else, will pay the bill, though there are no assets in the acceptor's hands. *Slatter v. Lafitte*, 6 Bingh. 623.*

Where the drawer of a bill makes it payable at his own house, a jury may infer that it is an accommodation bill. *Sharp v. Bailey*, 9 B. and C. 44.*

Notice, proof of, excused, on acknowledgment of liability, &c.] An acknowledgment by the drawer, who has become bankrupt, made after his bankruptcy, that the bill would not be paid, will supersede the proof of notice. *Brett v. Levett*, 13 East, 213. So a letter from the drawer of an accommodation bill, stating that it would be paid before next term, *Wood v. Brown*, 1 Stark. 217;⁸ so a promise, after dishonour of the bill, to pay if the holder would call again, *Lundie v. Robertson*, 7 East, 231; so where the drawer of a foreign bill, on being told it was dishonoured, says that his affairs are at that moment deranged, but that he would be glad to pay it as soon as his accounts with his agent are cleared, this admission will dispense with proof of a protest. *Gibbon v. Coggan*, 2 Campb. 188; and see *Greenway v. Hindley*, 4 Campb. 52, S. P. Where the plaintiff gave in evidence an agreement made between a prior indorser and the defendant (the drawer), after the bill became due, reciting that the defendant had drawn, amongst others, the bill in question; that it was over due, and ought to be in the hands of the prior indorser, and that it was agreed that the latter should

* 6 Eng. Com. Law Reps. 400. * 5 Id. 401. * 15 Id. 314. * 19 Id. 181.

* 17 Id. 329. * 2 Id. 363.

take the money due to him upon the bill by instalments, this agreement was held to dispense with notice of dishonour. *Gunson v. Metz*, 1 B. and C. 193.^c A payment or promise, without notice of the default, does not dispense with proof of notice. *Goodall v. Dolley*, 1 T. R. 712. *Bayley on Bills*, 236. Where the drawer, being a foreigner, on being asked to pay the bill, said, "I am not acquainted with your laws, if I am bound to pay it, I will," this was held not to dispense with notice. *Dennis v. Morrice*, 3 Esp. 158, nor will a mere offer to compromise. *Cuming v. French*, 2 Campb. 106 (n).

The whole of the defendant's admission must be taken together; and therefore, where he said, "I do not mean to insist upon want of notice, but I am only bound to pay you 70*l.*," Abbott, C. J., ruled that the plaintiff could only recover 70*l.*, though the bill was for 200*l.* *Fletcher v. Froggat*, 2 C. and P. 570.⁴

Where the drawer, before the bill became due, stated to the holder that he had no regular residence, but would call and inquire whether the bill would be paid, Lord Ellenborough held that proof of notice was unnecessary. *Phipson v. Kneller*, 4 Campb. 285; see also *Hill v. Heap, D. and R.*, N. P. C. 57.^e

The accidental destruction of a bill will not excuse the want of notice. *Thackray v. Blackett*, 3 Campb. 164.

[*Notice dispensed with by ignorance of drawer's residence.*] The want of due notice is answered by showing the holder's ignorance of the place of residence of the party whom he sues; and whether he used due diligence to find the place of residence, is a question for the jury. *Bateman v. Joseph*, 12 East, 433; and see *Baldwin v. Richardson*, 1 B. and C. 245.^f Thus, to excuse notice of the dishonour to an indorser, it is not enough to show that inquiries as to his residence were made at the place at which the bill was payable. *Beveridge v. Burgis*, 3 Campb. 262. Calling on the last indorser, and last but one, the day after the bill becomes due, to know where the drawer lives, and on his not being in the way, calling again the next day, and then giving the drawer notice, may be sufficient. *Browning v. Kinnear, Gow*, 81.^g Inquiry should be made of some of the other parties to the bill or note, and of persons of the same name. *Bayley on bills*, 229, citing *Beveridge v. Burgis*, 3 Campb. 262. In one case it was held sufficient, on the dishonour of a promissory note, to make inquiry at the drawer's for the residence of the payee. *Sturges v. Derrick, Wight*. 76.

An attorney employed to discover the residence of a party to a bill, and discovering it, has, like a banker, a day to consult his employer, and it is sufficient if he forward the information to him on the next day. *Firth v. Thrush*, 8 B. and C. 387.^h Where the holder is excused by special circumstances from giving notice

^c 3 Eng. Com. Law Reps. 56. ^d 12 Id. 267. ^e 16 Id. 435. ^f 8 Id. 68.

^g 5 Id. 471. ^h 13 Id. 242.

on the usual day, the common allegation of notice is still sufficient. *Ibid.*

Indorsee against Drawer.

In an action by the indorsee of a bill against the drawer, the plaintiff must prove, 1. The drawing of the bill, *ante*, p. 157; 2. The indorsement by the payee, and the subsequent indorsements stated in the declaration; 3. Presentment to the drawer or acceptor, *ante*, p. 157; 4. His default, *ante*, p. 159; 5. Notice of dishonour to the defendant, *ante*, p. 159.

The proofs therefore will be the same as in an action by the payee against the drawer, with the additional proof of the indorsements. The mode of proving a title by indorsement has already been stated, *ante*, p. 154.

Indorsee against Indorser.

In an action by an indorsee against the indorser of a bill, the plaintiff must prove, 1. The signature of the defendant; 2. The indorsements between that of the defendant and the plaintiff, as stated in the declaration, *ante*, p. 154; 3. The presentment to the drawee or acceptor, and the dishonour, *ante*, p. 157; 4. The notice of the dishonour to the defendant, *ante*, p. 159.

The indorsement of the defendant admits the handwriting of the drawer, and the defendant cannot insist that it is a forgery; *Lambert v. Oakes*, 1 *Ld. Raym.* 443; so it admits the ability and signature of all antecedent indorsers. *Bayley on bills*, 366, *Critchlow v. Parry*, 2 *Campb.* 182. In suing the indorsee on the non-payment of the bill by the drawee, it is unnecessary to state an acceptance, and if it be stated, it need not be proved. *Tanner v. Bean*, 4 *B. and C.* 312.¹

The rules with regard to the presentment of the bill and notice of dishonour, are in general the same in this action as in an action by the payee against the drawer, *ante*, p. 157. No evidence of a demand upon the drawer or prior indorsers is necessary. *Bromley v. Frazier*, 1 *Str.* 441. The fact that the drawer has never had any effects in the hands of the drawee, will not excuse the want of notice to the indorser, who has no concern with the accounts between the drawer and acceptor; *Wilkes v. Jacks*, *Peake*, 202, *Brown v. Maffey*, 15 *East*, 216; see *Lesson v. Thomlinson*, *Schw. N. P.* 324 (n); and the indorser, without consideration, but without fraud, of a bill, the drawer and acceptor of which prove to be fictitious persons, is entitled to notice. *Leach v. Hewitt*, 4 *Taunt.* 731. Proof of notice will be dispensed with by a promise to pay on the part of the defendant. *Wilkes v. Jacks*, *Peake*, 202. It seems that an express promise to pay must be proved, in order to discharge an indorser who has not had notice. *Borrodaile v. Lowe*, 4 *Taunt.* 93. Thus the following letter from the indorser was held not

¹ 10 Eng. Com. Law Reps. 340.

to waive the want of notice: "I cannot think of remitting till I receive the draft, therefore if you think proper you may return it to Trevor and Co., if you think me unsafe." *Ibid.* A promise to pay will dispense with the notice, though not made to the plaintiff, but to another person who was holder of the bill at the time. *Potter v. Rayworth*, 13 East, 418.

Evidence under the money counts.] An indorsement is *prima facie* evidence of money lent by the indorsee to his indorser. *Bayl. on bills*, 288.

Defence.

The most usual defences in actions on bills of exchange are, 1. Want of consideration. 2. Illegality of consideration. 3. Satisfaction, or release of the bill. 4. Giving time to certain parties. 5. Want of proper stamp.

Notice of disputing consideration.] As a consideration is presumed, the plaintiff is not supposed to come prepared to prove it, and he cannot be put upon such proof without a previous notice from the defendant to that effect. *Paterson v. Hardacre*, 4 Taunt. 114. It is said that in the King's Bench it is not necessary to give such notice, though it is usual and proper so to do. 2 Stark. Ev. 253. In order to entitle the defendant to give evidence of want of consideration, it is not necessary that he should give any notice to the plaintiff of his intention to do so. *Mann v. Lent*, 1 M. and M. 240. A notice to the plaintiff to prove the consideration is not alone sufficient to throw the burden of proof upon him. The defendant must first cast some suspicion on the plaintiff's title, by showing that the bill was obtained by force, fraud, &c.; *Reynolds v. Chettle*, 2 Campb. 516; *King v. Nelson*, 2 Campb. 5; and where notice has been given, and the plaintiff's counsel is apprised, by the cross-examination, that the consideration is disputed, it was formerly ruled that he must give his evidence in support of the bill in the first instance, and not in reply; *Spooner v. Gardiner*, R. and M. 86; but this practice has been since altered, and agrees with that of the King's Bench. *Ibid.* 255 (n). *Chitty*, 401, 7th ed. ante, p. 132.

In an action by the indorsee against the acceptor of a bill, if the defendant shows that there was originally no consideration for the bill, that throws it on the other party to show that he gave value for it. *Thomas v. Newton*, 2 C. and P. 606.*

Want of consideration, defence between what parties.] The want of consideration *in toto*, or in part, cannot be insisted upon if the plaintiff, or any intermediate party between him and the defendant, took the bill or note, *bonâ fide*, and upon a valid consideration, *Morris v. Lee*, *Bayl. on bills*, 397, and an indorsee for value may

* 12 Eng. Com. Law Reps. 235.

recover against the acceptor of an accommodation bill though he knew it to be such. *Smith v. Knox*, 3 *Esp.* 46. *Charles v. Marsden*, 1 *Taunt.* 224. Between immediate parties, as the drawer and acceptor, drawer and payee, indorsee and his immediate indorser, want of consideration may be insisted on. *Chitty on bills*, 91, 5th ed.

Want of consideration, what, a defence.] A total failure of consideration, is a total bar, inadequacy, or a partial failure, a bar *pro tanto* only; *Bayl. on bills*, 344, 4th ed.; and the defendant may pay part into court, and for the rest insist on want of consideration. *Barker v. Backhouse*, *Peake*, 61. *Wiffen v. Roberts*, 1 *Esp.* 261. But a partial failure of consideration will constitute no defence, if the quantum to be deducted is matter not of definite computation but of unliquidated damages; *Bayl. on bills*, 395; thus where a bill is given for goods, it is no defence that the price is exorbitant; *Solomon v. Turner*, 1 *Stark.* 51; or that the goods were damaged; *Morgan v. Richardson*, 1 *Campb.* 40 (n.). *Obbard v. Betham*, 1 *M. and M. MSS.* But the defendant may give evidence of fraud so as to avoid the contract altogether. *Lewis v. Cosgrave*, 2 *Taunt.* 2 *Solomon v. Turner*, 1 *Stark.*¹ 52.

Want of consideration—declarations of former holder when admissible.] In general, the declarations of the former holder of a bill are not admissible to prove the want of consideration. *Shaw v. Broom*, 4 *D. and R.* 730.* *Smith v. De Wruit*, *R. and M.* 212. *Barrough v. White*, 4 *B. and C.* 325.* But where the title of the plaintiff, and of the party whose declarations are offered in evidence, is identified, as where the plaintiff took the bill from him after it became due, such declarations are admissible. *Benson v. Marshal*, cited 4 *D. and R.* 732.*

Illegality of consideration, a defence between what parties.] In general this objection is confined to persons, parties, or privies to the illegality, and those to whom they have passed the bill without value; *Bayl. on bills*, 410, 4th ed. and a *bonâ fide* indorsee for value, without notice of the illegality, may recover on such bill. *Wyatt v. Bulmer*, 2 *Esp.* 538. But where the bill is given for money lost by gaming, or by betting on the side of persons gaming, or knowingly lent for gaming, the contract is void by stat. 9 Anne, c. 14, sec. 1, and no one can recover on such a bill against the person losing, but the indorsee may recover against the other parties to the bill; *Edwards v. Dick*, 4 *B. and A.* 212;† and by stat. 58 Geo. III. c. 93, an indorsee for value and without notice, of a bill given for an usurious consideration, may sue upon such bill. Where a statute prohibits a thing to be done, and does not expressly avoid the securities, which fall within the prohibition, then, if the violation of the law does not appear on the face of the instrument, and the

¹ 2 Eng. Com. Law Reps. 291. = 16 Id. 480. = 10 Id. 346. • 16 Id. 221.
† 6 Id. 406.

party taking it is ignorant that it was made in contravention of the statute, it is an available security in the hands of such persons. *Per Holroyd, J., Broughton v. Manchester Water Works*, 3 B. and A. 10.^a

Before the 58th Geo. III. c. 93, the indorsement of a bill for an usurious consideration prevented a subsequent *bonâ fide* indorsee from recovering on the bill, if he claimed through such indorsement. *Lowes v. Mazzaredo*, 1 Stark. 385. *Chapman v. Black*, 2 B. and A. 599. But since that statute, such an indorsee on proving that he gave a valuable consideration for the bill, may recover upon it. *Wyatt v. Campbell*, *Chitty's Stat.* 121 (n), 1 M. and M. 80, S. C.

Illegality of considerations going to part only.] If part of the consideration is illegal, the bill cannot be put in suit; *Scott v. Gilmore*, 3 Taunt. 226; *Bayl. on bills*, 406, 4th ed.; but if part of the consideration is good, the plaintiff may recover on that, though not on the bill. *Robinson v. Bland*, 2 Burr. 1077.

Illegality of consideration—substituted bills.] If a new bill is substituted for one which was given upon an illegal consideration, it will be subject to the same objections as the original bill, unless it is reformed so as to exclude what made it illegal; though the new bill is given to an indorsee who took the first security innocently and for value, especially if he was apprised of the illegality in the first bill. *Chapman v. Black*, 2 B. and A. 588, *Bayley on bills*, 407. But where a bond or note is void, on account of its being a security for usurious interest, a subsequent security for no more than the principal and legal interest is binding. *Per Holroyd, J., Preston v. Jackson*, 2 Stark. 238. *Barnes v. Headley*, 2 Taunt. 184. *Wicks v. Gogerly, R. and M.* 123. If a bill or note is given in part upon an illegal consideration, and several bills or notes are afterwards substituted in lieu thereof, the effect of the illegality may be confined to only some of the substituted bills or notes, and the others stand exempt. Thus, where a bill or note is given as to half for a gaming debt, and, as to the residue, for money lent, and two bills or notes of equal amount, are afterwards substituted for it, if the giver does any thing which may be considered an election to ascribe the gaming debt to the one, he will be liable upon the other. *Habner v. Richardson*, *Bayley on bills*, 409.

In an action by the indorsee against the maker of a promissory note, letters from the payee to the maker, contemporaneous with the making of the note, are evidence to prove usury in the concoction of the note. *Kent v. Lowen*, 1 Campb. 177, 180, d; see 1 Barn. and Adolp. 89.

Satisfaction.] The acceptor may prove in bar of the action, that the holder has received satisfaction from the drawer, provided

^a 5 Eng. Com. Law Reps. 215. ² 2 Id. 438. ³ 3 Id. 332.

the drawer be not also the payee; *Beck v. Robley*, 1 H. Bl. 89 (n); but if the drawer be also the payee, he may after taking up the bill re-issue it, and the acceptor will be liable to the indorsee. *Callow v. Lawrence*, 3 M. and S. 95. It seems that twenty years will not afford a presumption that a bill, or note, has been satisfied, where the statute of limitations is not pleaded. *Du Belloix v. Lord Waterpark*, 1 D. and R. 17; [†] see *ante*, p. 14. A judgment against a subsequent party to a bill will not discharge a prior party, it is only an extinguishment between the parties to the judgment; *Bayl. on bills*, 267, 4th ed. *Hayling v. Mulhall*, 2 W. Bl. 1235, *English v. Darley*, 2 B. and P. 62; so the holder may sue the drawer after taking the acceptor in execution. *Ibid.* *Macdonald v. Bowington*, 4 T. R. 825. A composition with the acceptor, and the taking a third person's note as a security for the composition money, operate as a satisfaction of the bill. *Lewis v. Jones*, 4 B. and C. 513.[‡]

If a bill is renewed by the acceptor on the terms of his paying the costs of an action brought upon it, and these costs are not paid, the holder of the bill may sue the acceptor, though the second bill is outstanding in the hands of an indorsee. *Norris v. Aylett*, 2 Campb. 329. But taking a new bill from the acceptor, the original bill to be kept as a security, operates as an agreement that, in the meantime, the original bill shall not be enforced. *Per Lord Ellenborough, Gould v. Robson*, 8 East, 580; see *Dillon v. Rimmer*, 1 Bingh. 100.[‡] But where one of three partners, after a dissolution of partnership, undertook, by deed, to pay a particular partnership debt on two bills of exchange, which was communicated to the holder, who consented to take the separate notes of the one partner for the amount, strictly reserving his right against all three, and retaining possession of the original bills, it was held that the separate notes having proved unproductive, he might resort to his remedy against the other partners, and that the taking the separate notes, and afterwards renewing them several times successively, did not amount to satisfaction of the joint debt. *Bedford v. Deakin*, 2 B. and A. 210. So where on a bill of exchange being dishonoured, the acceptor transmitted a new bill for a larger amount to the payee, but had not any communication with him respecting the first, and the payee discounted the second bill with the holder of the first, which he received back as part of the amount, and afterwards, for a valuable consideration, indorsed it to the plaintiff, it was held that the second bill was merely collateral security, and that the receipt of it by the payee, did not amount to giving time to the acceptor of the first bill so as to exonerate the drawer. *Pring v. Clarkson*, 1 B. and C. 14; [‡] see also *Featherstone v. Hunt*, 1 B. and C. 113.[‡] Satisfaction as to one of several partners is a satisfaction as to all. *Jacaud v. French*, 12 East, 317.

[†] 16 Eng. Com. Law Reps. 12. [‡] 10 Id. 393. [‡] 8 Id. 263. [‡] 8 Id. 10.
[‡] 8 Id. 34.

Release and waiver.] A release to a subsequent party will not discharge a prior party to the bill. *Carstairs v. Rolleston*, 1 Marsh. 207, 5 Taunt. 551,⁷ *S. C. Smith v. Knox*, 3 Esp. 47. An agreement to consider an acceptance "at an end;" *Walpole v. Pulleney*, cited Dougl. 236; or a message to the acceptor of an accommodation bill, that the business was settled with the drawer, and he need give himself no further trouble, is an express waiver, and a good defence in an action against the acceptor; *Black v. Peele*, cited Dougl. 236; but a declaration by the holder, that he should look to the drawer for payment, and that he wanted no more of the acceptor than another debt not connected with the bill, will not be sufficient to discharge the acceptor; *Parker v. Leigh*, 2 Stark. 228;⁸ and, if the holder receives part of the money from the drawer, and takes a promise from him upon the back of the bill for the payment of the residue at an enlarged time, it is for a jury to say whether this is not a waiver of the acceptance; *Ellis v. Galindo*, cited Dougl. 250, Bayl. on bills, 165, 4th ed.; but see *Dingwall v. Dunster*, Dougl. 235; where it was held, that nothing but an express declaration by the holder will discharge the acceptor. See also *Parker v. Leigh*, 2 Stark. 228.⁹ *Adams v. Gregg*, 2 Stark. 531.¹⁰ *Farquhar v. Southey*, 1 M. and M. 14.

Giving time.] Giving time to a principal discharges a surety, and therefore the giving time to the acceptor discharges the drawer and indorsers. *English v. Darley*, 2 B. and P. 61. Thus if the holder takes another bill from the acceptor at a short date, and agrees to keep the original bill in his hands as a security, it is a discharge to the indorsers. *Gould v. Robson*, 8 East, 570; ante, p. and see the other cases there cited. But a conditional agreement to give time to the acceptor, on his paying part, which condition is not performed by the acceptor, is not a discharge to the indorsers. *Badnall v. Samuel*, 3 Price, 521. An assent by the drawer or indorser to the giving time; *Clarke v. Devlin*, 3 B. and P. 363; see *Withall v. Masterman*, 2 Campb. 178; or a promise to pay the bill with a knowledge of time having been given; *Stevens v. Lynch*, 12 East, 38; will prevent the giving time from operating as a discharge. Forbearance to sue the acceptor will not of itself be a discharge. *Wakyn v. St. Quintin*, 1 B. and P. 652. *English v. Darley*, 2 B. and P. 62, 3 Price, 533. Taking a cognovit from the acceptor by which the time of obtaining judgment against him is not deferred, does not seem to be such a giving of time as will discharge the drawer. *Jay v. Warren*, 1 Carr. and P. 532,¹¹ *Lee v. Levi*, 4 B. and C. 390,¹² 5 Taunt. 319.¹³ The taking a warrant of attorney from the acceptor, after action brought against the indorser, cannot be given in evidence under the general issue in the latter action, being matter of defence, arising after action brought. *Lee v. Levi*, 4 B. and C. 320.¹⁴

⁷ 1 Eng. Com. Law Reps. 184. ⁸ 3 Id. 327. ⁹ 3 Id. 461. ¹⁰ 11 Id. 460.
¹¹ 10 Id. 364. ¹² 1 Id. 119.

Where a bill was accepted for the accommodation of the drawer, and the holder knowing that circumstance gave time to the drawer, Lord Ellenborough held the acceptor discharged; *Laxton v. Peat*, 2 Campb. 185; *Collott v. Haigh*, 3 Campb. 281; but this case has been frequently doubted. *Raggett v. Axmore*, 4 Taunt. 730, *Fentum v. Pocock*, 5 Taunt. 192,* *Kerrison v. Cooke*, 3 Campb. 362; but see *Adams v. Gregg*, 2 Stark. 531,† see also *Hill v. Read, D. and R.*, N. P. C. 26.‡ But where time was given to the accommodation acceptor, Lord Ellenborough ruled that the drawer was not discharged. *Collott v. Haigh*, 3 Campb. 281. So where the acceptor is the agent of the drawer, the latter will not be discharged by time given to the former. *Clarke v. Noel*, 3 Campb. 411.

Competency of Witnesses.

Drawer.] In an action against the acceptor, the drawer is in general a competent witness, either for the plaintiff or for the defendant; for, if the plaintiff recovers, the drawer pays the bill by the hands of the acceptor; if the plaintiff fails, the drawer is liable to pay the bill himself. *Bayl. on bills*, 419. Thus, he may be called by the plaintiff to prove the defendant's handwriting; *Dickinson v. Prentice*, 4 Esp. 32; or by the defendant to prove that the plaintiff discounted the bill on an usurious consideration; *Brard v. Ackerman*, 4 Esp. 119; *Rich v. Topping, Peake*, 224, 1 Esp. 177, S. C. *Bayley on bills*, 420; or that the bill has been paid; *Humphrey v. Moxon, Peake*, 52; see also *Williams v. Keats, Mann. Index*, 328; and it is no objection that he is a prisoner on a charge of having forged the bill. *Barber v. Gingell*, 3 Esp. 62. But where the acceptor has accepted the bill for the accommodation of the drawer (the witness), the latter is not a competent witness for the defendant, for, if the plaintiff should fail, the witness would be discharged from his liability to indemnify the defendant against the costs of the action on the bill. *Jones v. Brooke*, 4 Taunt. 464. *Hardwick v. Blanchard, Gow*, 113.‡ Where the witness has become bankrupt, and the costs are proveable under the commission, and he has obtained his certificate, he is then admissible. *Brind v. Bacon*, 5 Taunt. 183.† *Moody v. King*, 2 B. and C. 558.‡ Where a bill has been drawn by one partner, in fraud of the rest, to pay a separate creditor, a copartner is a competent witness for the acceptor in an action against him by the creditor to prove the want of authority. *Ridley v. Taylor*, 13 East, 176.

Where the defence was a gaming consideration, the drawer was called by the defendant. It was objected, that he was interested to defend the plaintiff, being liable for treble penalties if he recovered, but not if he failed. It was held, that the witness was competent, since if the plaintiff failed, the witness was liable to him: if he succeeded, the witness might deliver himself from the penalties

* 1 Eng. Com. Law Reps. 72. † 3 Id. 461. ‡ 16 Id. 418. § 5 Id. 480.

¶ 1 Id. 68. † 9 Id. 177.

by refunding within the time. *Habner v. Richardson, Holroyd, J.* 1818, *Manning's Index*, 327.

Indorser.] In an action by indorsee against drawer or acceptor, the indorser is in general a competent witness, either for plaintiff or defendant; for the plaintiff, because though the plaintiff's succeeding in the action *may* prevent him from calling for payment from the indorser, it is not certain that it will, and whatever part of the bill or note the indorser is compelled to pay, he may recover again from the drawer or acceptor;—for the defendant, because if plaintiff fails against drawer or acceptor, he is driven either to sue the indorser, or to abandon his claim. *Bayl. on bills*, 422. For the plaintiff he may be called to prove his own indorsement, *Richardson v. Allen*, 2 *Stark.* 334.¹ or upon a bill drawn for his own accommodation, that the plaintiff, the indorsee, gave him value for it, *Shuttleworth v. Stephens*, 1 *Campb.* 408, or that the defendant promised to pay the bill after it became due. *Stevens v. Lynch*, 2 *Campb.* 332. For the defendant the indorser may be called to prove that he had paid the bill, *Charrington v. Milner, Peake*, 6, *Birt v. Kershaw*, 2 *East*, 458, or that an unstamped bill, dated abroad, was in fact made here. *Jordaine v. Lashbrooke*, 7 *T. R.* 601.

In an action by indorsee against acceptor, the indorser, though released by the defendant, was held incompetent to prove that he delivered the bill to the plaintiff merely for the purpose of procuring payment as agent for the witness. *Buckland v. Tankard*, 5 *T. R.* 578. But this decision has been doubted. *Birt v. Kershaw*, 2 *East*, 451. 1 *Phill. Ev.* 63, 6th ed.

Drawee or acceptor.] The acceptor is a competent witness for the plaintiff, to prove that he had no effects of the drawer, the defendant, in his hands, *Staples v. Okines*, 1 *Esp.* 332; for though the plaintiff recovers, the witness remains liable to the defendant. So the drawee may be called to prove the same fact. *Legge v. Thorpe*, 2 *Campb.* 310. In an action against a drawer, it has been held that the acceptor is not a competent witness for the defendant, to prove a set-off, on the ground that he is answerable to the drawer only to the amount which the plaintiff recovers against the defendant, *Mainwaring v. Mytton*, 1 *Stark.* 83,² *sed quære*; for it seems that the drawer would be entitled to call upon the acceptor for the full amount of the bill. *Bayl. on bills*, 424. It seems that a statement by the drawee, as to the drawer, the defendant, not having effects in his hands, is evidence against the drawer, if made at the time of presentment, but not if made subsequently. *Prideaux v. Collier*, 2 *Stark.* 57,³ on the ground that the drawee is for that purpose the agent of the drawer.

¹ 3 Eng. Com. Law Reps. 371. = 2 Id. 306. = 3 Id. 242.

In an action against the acceptor of a bill, the acceptor was called for the defendant to prove, that after being accepted by him and indorsed by the defendant, the bill was put into his (the acceptor's) hands for the purpose of getting it discounted, that he took it for that purpose to the plaintiff, who having got hold of it refused either to discount or return it. It was objected that the witness was incompetent on the ground of interest, and Lord Tenterden rejected him. The Court of King's Bench refused a rule for a new trial moved for on the ground that the witness was improperly rejected. Per Lord Tenterden, "I am of opinion that the testimony was properly rejected. It appeared by the statement of the defendant's counsel, that the witness was answerable for the payment of the bill by himself, and there was an implied undertaking by him to indemnify Lowe (the drawer and defendant.) He was, therefore, interested in the result of the action, inasmuch as the costs, if the plaintiff succeeded, would ultimately fall on himself." *Edmonds v. Lowe*, 8 B. and C. 407.*

ASSUMPSIT ON PROMISSORY NOTES.

In general, the rules relating to the proof of the drawing, indorsing, presentment, and notice of dishonour of bills of exchange, apply also to promissory notes. Where a different rule prevails, the distinction will be noticed.

In an action on a promissory note, the note must be produced and proved, *see ante*, p. 147, and any material variance between the statement and proof will be fatal, *see ante*, p. 148, to p. 151.

Payee against Maker.

In an action on a promissory note by the payee against the maker, the plaintiff must prove the making of the note by the defendant, and in some cases, a presentment of the note at a certain place.

The making of the note.] The making of the note will be proved by proving the handwriting of the defendant, *see ante*, p. 68; or, if made by an agent, by proof of the handwriting and authority of such agent. If the note is for less than 5*l.* it must be attested by a subscribing witness, 7 Geo. III. c. 30, s. 1, and such attesting witness must be called; or if dead, or he cannot be found, *ante*, p. 65, his handwriting must be proved, and some evidence must be given of the identity of the maker of the note. An admission by the defendant that the handwriting is his, will be sufficient proof in the case of an unattested note, though it was made pending a treaty for a compromise. *Waldridge v. Kennison*, 1 Esp. 148. An offer on

the part of the defendant, after the note has become due, to give another note to the plaintiff instead of it, is an admission of the plaintiff's title. *Bosanquet v. Anderson*, 6 *Esp.* 43. An admission of his signature, by one of the parties, will only be evidence against himself. *Gray v. Hodson*, 1 *Esp.* 135.

Presentment.] Where the promise to pay is general, no presentment to the maker need be stated or proved. But, where the note contains in a body of it, and not merely in a memorandum at the foot, a promise to pay at a particular place, a presentment at such place must be proved, *see ante*, p. 159, but notice to the maker, of the dishonour, is unnecessary. *Pearce v. Pemberthy*, 3 *Campb.* 261. Circumstances which would excuse the presentment, as that the maker could not be found, cannot be given in evidence under the general allegation of presentment; *Leeson v. Pigott*, *Bayl. on bills*, 324; and *see Smith v. Bellamy*, 2 *Stark.* 223; but if a note be made payable at a particular town, and the maker has no residence there, a presentment at the banking-houses there will justify and support an allegation that it was presented there to the maker. *Hardy v. Woodroffe*, 2 *Stark.* 319. *Bayley on bills*, 324. A note payable at two places may be presented at either. *Beeching v. Gower*, *Holt*, 313. In an action on a note payable on demand, a demand need not be alleged or proved, for the action itself is a demand. *Rumball v. Ball*, 10 *Mod.* 38.

Evidence under the common counts.] A promissory note is evidence of money lent by the payee to the maker. *Bayl. on bills*, 286. Where a note cannot be given in evidence for want of a proper stamp, the plaintiff may recover on the consideration of the note, if the declaration contains counts on such consideration, and if he is not precluded from availing himself of them by the terms of his particular. *Wilson v. Kennedy*, 1 *Esp.* 245. *Farr v. Price*, 1 *East*, 58. *Wade v. Beasley*, 4 *Esp.* 7. The plaintiff will not be allowed to resort to the money counts if the note has been lost, unless he can prove it destroyed, or show that the defendant cannot be again subjected to the payment of it. *Dangerfield v. Welby*, 4 *Esp.* 159, *ante* p. 147.

Indorsee against Maker.

In an action on a promissory note by an indorsee against the maker, the plaintiff must prove the making of the note by the defendant, *see ante*, p. 157, and the indorsement stated in the declaration.

It has been already stated in what manner an indorsement is to be proved, *ante*, p. 154, what indorsements are good, *ante*, p. 155, and what needs be proved, *ante*, p. 156, as well as in what cases the plaintiffs must prove that they are in partnership, *ante*, p. 156. In declaring upon a note made to payee or bearer, the indorsements

need not be mentioned, but if stated, they must, it seems, be proved. *Waynam v. Bend*, 1 *Campb.* 175; but see *Tanner v. Bean*, 4 *B. and C.* 312.*

Evidence under the common counts.] It is said that a promissory note is *prima facie* evidence of money had and received by the maker to the use of the holder; *Bayl. on bills*, 287; but Lord Ellenborough was of opinion, that the indorsee could not recover against the maker on the money counts, as he was not an original party to the note, and there was no evidence of any value received by the defendant from him. *Waynam v. Bend*, 1 *Campb.* 175; see *ante*, p. 156.

Indorsee against Indorser.

In an action by an indorsee against the indorser of a promissory note, the plaintiff must prove the defendant's indorsement, the presentment to the maker and his default, and notice to the defendant of the dishonour.

Indorsement.] In what manner an indorsement must be proved has been already stated, *ante*, p. 154. It admits all prior indorsements, *ante*, p. 154, and also the handwriting of the maker. *Free v. Hawkins*, *Holt, N. P. C.* 550.¹ When an indorsement is attested (on a note for payment of less than 5*l.*), it must be proved by the subscribing witness. As to what indorsements it is necessary to prove, see *ante*, p. 156.

Presentment.] In what manner a promissory note or bill of exchange must be presented, has already been stated, *ante*, p. 157. Where a note is made payable *in the body of it* at a particular place, it must be presented there, *ante*, p. 149. As to proof of the maker's default, see *ante*, p. 161.

Notice of dishonour.] It has been before stated by and to whom, *ante*, p. 160, and within what time, *ante*, p. 161, notice must be given, as also what will be considered sufficient proof of the delivery of the notice, *ante*, p. 161, and of its contents, *ante*, p. 162. It has also been shown in what cases proof of notice may be dispensed with by an acknowledgment on the part of the defendant of his liability, *ante*, p. 164. Where the payee of a note indorses it for the accommodation of the maker, it is still necessary to give notice to the payee in order to charge him, and it is no defence that it was agreed between the parties that the note should not be put in force. *Free v. Hawkins*, 8 *Taunt.* 92.*

Evidence under the common counts.] An indorsement is evidence of money lent by the indorsee to the indorser. *Kessebower v. Tims*. *Bayl. on bills*, 288.

* 10 Eng. Com. Law Reps. 340. ¹ 3 *Id.* 184. * 4 *Id.* 31.

Competency of Witnesses.

Maker.] The maker of a promissory note is a competent witness for the plaintiff, in like manner as the acceptor of a bill of exchange, *ante*, p. 173; and one of the joint makers is a competent witness for the plaintiff, to prove the signature of the defendant, the other joint maker. *York v. Blott*, 5 M. and S. 71. In an action by the indorsee against the payee of a note, the maker may be called to prove an alteration; *Levi v. Essex*, 2 Esp. Dig. 211, 4th ed.; and he may be called to prove notice, in an action by indorsee against indorser. *Venning v. Shuttleworth*, Bayley, 422.

Indorser.] The indorser of a note is in general a competent witness either for the plaintiff or defendant, in an action by a subsequent indorsee against the maker, *ante*, p. 173. But the payee of a note made for his accommodation, who has become bankrupt, and obtained his certificate, subsequently to the date of the note, is not a competent witness for the defendant, the maker, to prove that the note was indorsed to the plaintiff after it became due, for he is no longer liable to the plaintiff, though he still remains liable to the defendant, if the latter should be compelled to pay the note. *Moundrel v. Kennet*, 1 Campb. 408 (n). But the payee of an accommodation note, who has indorsed it to the plaintiff, is a competent witness for the plaintiff to prove that he indorsed it for a valuable consideration, since he has an equal interest on each side. If the plaintiff succeeds, the witness becomes liable to the defendant; if the defendant succeeds, the witness remains liable to the plaintiff. *Shuttleworth v. Stephens*, 1 Campb. 407.

ASSUMPSIT ON POLICIES OF INSURANCE.

In suing on a policy of insurance, the plaintiff must prove, 1. The execution of the policy by the defendant. 2. The interest of the party as averred. 3. The inception of the risk, and, in some cases, compliance with warranties and a license. 4. The loss.

Proof of the policy.] The policy must be produced and proved, and if subscribed by an agent of the defendant, the handwriting and authority of the agent must be proved. If the authority was in writing it should be produced and proved. The authority may also be proved by showing that the defendant has recognised the act of the agent in this instance, or in other similar instances in which the agent has subscribed policies for the defendant; *Neale v. Erving*, 1 Esp. 61; and where a witness stated that he was authorised by power of attorney, but added that the defendant had been in the habit of paying losses upon policies which the witness

had subscribed in his name, Lord Ellenborough ruled, that the power of attorney need not be produced. *Houghton v. Exobank*, 4 *Campb.* 88. Where a witness proved the agent's handwriting, and swore that he had often observed him sign policies for the defendant, but he had not seen any general power of attorney from the defendant to the agent, nor did he know that the defendant had given the agent any authority to sign this specific policy, nor was he acquainted with any instance in which the defendant had paid a loss upon a policy so subscribed, Lord Ellenborough held that the proof of agency must be carried further. *Courteen v. Touse*, 1 *Campb.* 43.

Parol evidence of what passed at the time of effecting the policy is inadmissible. *Weston v. Emes*, 1 *Taunt.* 115. Though evidence of the custom of trade may be received, *ante*, p. 10. Thus where the question was as to when the risk determined, Lord Mansfield ruled, that insurance brokers and others might be examined as to the general opinion and understanding of persons concerned in the trade, though they know no particular instance, in fact, upon which such opinion was founded. *Camden v. Cowley*, 1 *W. Bl.* 417.

Interest in the ship, how proved.] The interest in the ship, as stated in the declaration, may be proved, *primâ facie*, by evidence of possession of the ship, or of acts of ownership, as directing the loading of the ship, purchasing the stores, paying the people employed, &c. *Amery v. Rogers*, 1 *Esp.* 207. *Thomas v. Foyle*, 5 *Esp.* 88. The ordinary mode of proof is to call the captain, who will prove that he was appointed and employed by the parties; and though it should appear, on cross examination, that the parties claim under a bill of sale, it is not on that account necessary for the plaintiffs to produce the bill of sale, or the ship's register, unless such further evidence should be rendered necessary in support of the *primâ facie* case of ownership, in consequence of the adduction of contrary proof on the other side. *Robertson v. French*, 4 *East*, 137. The certificate of registry is not even *primâ facie* evidence of ownership. *Pire v. Anderson*, 4 *Taunt.* 652. Where the interest is averred in parties who have never been in possession of the ship, it will be necessary to prove the ownership of the persons from whom such parties claim, and the derivative title from them, viz. the bill of sale, and the registry of the ship, according to the register acts (see the last register act, 6 *Geo. IV.* 110), and see *ante*, p. 62, the section as to the copies of affidavits and registers.

Interest in goods, how proved.] The interest in the goods may be proved *primâ facie*, like the interest in the ship, by evidence of possession and acts of ownership. It is also frequently proved by the production of the bill of lading. A bill of lading directing

the delivery of the goods to the consignee is evidence of interest in him, and where made deliverable to the consignor, and indorsed by him either specially or in blank, it is evidence of interest in the indorsee, or holder, *McAndrew v. Bell*, 1 Esp. 373. *Lickbarrow v. Mason*, 2 T. R. 71, but if the master qualifies his acknowledgment by the words "contents unknown," the bill of lading will not be evidence. *Haddow v. Parry*, 3 Taunt. 303. The signature of the master to the bill of lading must be proved, and also the indorsement, when the party claims under it. If the master is dead, proof of his death and handwriting is sufficient evidence of interest. *Haddow v. Parry*, 3 Taunt. 303. Where to prove property in a cargo the plaintiff produced a bill of parcels of one Gardiner at Petersburg, with his receipt to it, and proved his hand, *Lee, J. C.*, admitted the evidence. *Russel v. Boheme*, 2 Str. 1127. By stat. 6 Geo. IV. c. 94, s. 2, any person (after 1st Oct. 1826) intrusted with, and in possession of any bill of lading, dock warrant, &c., warrant or order, for delivery of goods, shall be deemed and taken to be the true owner of the goods, so as to give validity to any contract for sale of the goods, or any deposit or pledge, provided there be no notice by the documents themselves that the person intrusted, as aforesaid, was not the actual owner, and see *Wright v. Campbell*, 4 Burr. 2047.

Interest, variance in proof of.] A material variance in proof from the allegation of interest is ground of nonsuit. Thus, where it is averred that the interest is in a single person, and that the policy was made on his account, and for his use and benefit, and it is proved that the interest is in several, and that the policy was made on their joint account, it is a fatal variance. *Bell v. Ansley*, 16 East, 141; see *Caruthers v. Shedden*, 1 Marsh. 416; 6 Taunt. 14, S. C. But if it be averred that the plaintiff was interested at the time of effecting the policy, it is sufficient to show that he was interested at the commencement of the risk. *Rhind v. Wilkinson*, 2 Taunt. 237. Where a policy averred the interest to be in A. B. who was interested at the time, it is sufficient to prove an adoption of the policy by A. B. after the loss. *Hagedorn v. Oliverson*, 2 M. and S. 485.

Inception of the risk.] Where a vessel is lost in the course of a voyage for which she is insured, some proof of the inception of the voyage, or risk, must be given. *Koster v. Innes, R. and M.* 336. This may probably be proved by some of the crew, or proof of a particular destination by charter-party, would afford a presumption that she sailed on the chartered voyage; so proof of her clearing out for a particular port is evidence that she set sail for that port when she dropped from her moorings. *Per Lord Ellenborough*,

Cohen v. Hinckley, 2 Campb. 52. *Marsh. Ins.* 715. So proof of a convoy bond for a particular port, signed by the captain, coupled with the evidence of the custom house officer that a certificate and other papers for such a voyage would in the regular course of office, be delivered to the captain before he sailed, together with proof of the sailing, has been held evidence of the ship having sailed on such voyage. *Cohen v. Hinckley*, 2 Campb. 51. A license for the port mentioned in the policy is evidence to the same effect. *Marshall v. Parker*, 2 Campb. 69. If the declaration aver that the ship sailed *after* the making of the policy, but in fact it was before, the variance is not material. *Peppin v. Solomons*, 1 T. R. 496.

Shipment of the goods.] The shipment of goods on board is usually proved by the captain, and, if he be dead, the production of the bill of lading and proof of his handwriting will be evidence of the shipping as well as of the interest. *Haddow v. Parry*, 3 Taunt. 306. But where the bill of lading was offered in evidence to prove that the goods *were shipped* on the plaintiff's account, Lord Ellenborough rejected it, as being nothing more than the declaration of the captain. *Dickson v. Lodge*, 1 Stark. 226.* So the copy of an official paper made in pursuance of an act of parliament, by an officer of the customs, containing an account of the cargo, and a report of the goods on board, is evidence to prove the shipping. *Johnson v. Ward*, 6 Esp. 49.

Compliance with warranties.] Where the policy contains a warranty, a literal and strict compliance with it must be proved; it is not sufficient to show something tantamount to a performance. *Pawson v. Watson*, Cowp. 785. 2 Saund. 200, c (n). See *Weir v. Aberdeen*, 2 B. and A. 320. To satisfy a warranty "to depart" on or before a particular day, the vessel must be out of port on or before that day; a warranty "to sail" is satisfied by the ship breaking ground and getting under weigh. *Moir v. Roy*, Ex. Ass. Co., 3 M. and S. 461, 6 Taunt. 241;† and see *Lang v. Anderdon*, 3 B. and C. 495.‡ But unless she is unmoored, the warranty to sail is not complied with. *Nelson v. Salvador*, 1 M. and M. 309. Sailing before the vessel has got her clearances, and is equipped for the voyage, is not a sailing within the warranty. *Redsdale v. Newnham*, 3 M. and S. 456. Where a vessel sailed from St. Anne's, Jamaica, within the time of warranty, with her cargo and clearances on board, and called at Bluefields, another port in Jamaica, for convoy, where she was detained by an embargo till after the time of warranty, it was held that this was a sufficient sailing from Jamaica. *Bond v. Nutt*, Cowp. 601. *Thelusson v. Fergusson*, Dougl. 361.

* 2 Eng. Com. Law Reps. 367. † 1 Id. 372. ‡ 10 Id. 163.

To prove the sailing with convoy, the log-book, or the official letter of the commander of the convoy, is evidence. *D'Israeli v. Howett*, 1 Esp. 427. *Watson v. King*, 4 Campb. 275.

In order to prove a warranty that the ship insured is of a particular nation, proof of her carrying the flag of that nation at times when she was free from the danger of capture, and that the captain addressed himself to the consul of that nation in a foreign port, is *prima facie* evidence. *Archangelo v. Thompson*, 2 Campb. 620. Under a warranty of neutrality it is sufficient to show that the ship was neutral when the risk commenced. *Eden v. Parkinson*, 2 Dougl. 732, a.

There are also certain implied warranties, the breach of which will prevent the plaintiff from recovering, as that the vessel is seaworthy, but it is sufficient if she is seaworthy at the time of sailing. *Annen v. Woodman*, 3 Taunt. 299. *Prima facie* a ship is to be deemed seaworthy; *Parker v. Potts*, 3 Dow, 31; but where the inability of the ship to perform the voyage becomes evident in a short time from the commencement of the risk, the presumption is, that it arises from causes existing before her setting sail on the intended voyage, and that the ship was not then seaworthy, and the *onus probandi*, in such case, rests with the assured to show that the inability arose from causes subsequent to the commencement of the voyage. *Per* *Ld. Eldon*, *Watson v. Clark*, 1 Dow, 344; *see also Douglas v. Scougall*, 4 Dow, 269. So the insured are not entitled to recover unless they equip the ship with every thing necessary to her navigation during the voyage. *Per* *Ld. Kenyon*, *Law v. Hollingworth*, 7 T. R. 161. *Forshaw v. Chabert*, 3 B. and B. 166. *Tait v. Levi*, 14 East, 481. A ship is not fit for a voyage unless she sails with a complete crew; a crew competent for the voyage, considering its length and the circumstances under which it is undertaken. *Per* *Ld. Tenterden*, *Clifford v. Hunter*, 1 M. and M. 103. Therefore, where on a voyage from the Mauritius to London, there was no one on board competent to supply the captain's place, in case of illness, the underwriters were held to be discharged. *Ibid.* But where the assured has once provided a sufficient crew, the negligence of the crew at the time of the loss is no breach of the implied warranty. *Bush v. Roy. Ex. Ass.* 2 B. and A. 73. There is no implied warranty on the part of the owner of goods insured, that the ship shall be in all respects properly documented. *Caruthers v. Gray*, 3 Campb. 142. Where a question arises as to the seaworthiness of a ship, ship-builders who have never seen the ship may state their opinion on examining a survey taken by others, it being a matter of skill and science. *Beckwith v. Sydebotham*, 1 Campb. 117. *Thornton v. Roy. Ex. Ass. Co. Peake*, 26. As to the effect of a sentence of a foreign Court of Admiralty in negating a warranty of neutrality, *vide ante*, p. 103.

A memorandum written on a separate piece of paper and enclosed in the policy cannot be considered a warranty. *Porson v. Burnewell*, 1 Dougl. 12 (n). But it is immaterial whether the warranty is on the margin or in the body of the policy. *Bean v. Stupart*, 1 Dougl. 11. *De Hahn v. Hartley*, 1 T. R. 343. A warranty may be waived by a memorandum on the policy without a new stamp. *Hubbard v. Jackson*, 4 Taunt. 174. *Weir v. Aberdeen*, 2 B. and A. 325 ante, p. 128.

License.] Where the voyage has been legalized by a license, such license must be produced and proved. Where a license granted by the governor of a foreign colony has been lost, parol evidence of its contents is admissible. *Kensington v. Inglis*, 8 East, 273, ante, p. 3. But where a license has been granted by the secretary of state in this country (pursuant to 48 Geo. III. c. 126), parol evidence is not admissible, for there must be some register of it preserved in the office of the secretary of state, which would be better than parol evidence, and if the license was under the sign manual, still some register of it would be preserved. *Rhind v. Wilkinson*, 2 Taunt. 243. By the above-mentioned statute, a duplicate of the order in council, authorising the grant of the license, is to be annexed to it; if the license is lost, examined copies of the order in council from the council books, and of the license in the office of the secretary of state, must be produced as the best secondary evidence, and it must be proved that the license put on board the ship is lost. *Eyre v. Palsgrave*, 2 Campb. 606. Proof that a vessel, warranted to carry a French licence, remained at Bordeaux a month after the inspection of the document purporting to be a French license, and of other documents, by the officers of the French government, is *prima facie* evidence that the document is genuine. *Everth v. Tunno*, 1 Stark. 508.* The license must be shown to apply to the voyage in question. *Barlow v. McIntosh*, 14 East, 311. On proof that goods, which cannot be exported without a license were entered for exportation at the Custom-house, it will be presumed that there was a license to export them. *Van Omeron v. Dowick*, 2 Campb. 43.

Proof of loss by the perils of the seas.] The loss must be proved to have happened as stated in the declaration, and therefore where goods were insured at and from M. to L., and the declaration averred, that after the loading of the goods the ship departed on her intended voyage, and while in the course of her said voyage was lost by the perils of the seas, it was held that this was a material allegation, and was not supported by proof that the ship was lost at her moorings, and before the cargo was completed. *Abithol v. Bristow*, 2 Marsh. 157. 6 Taunt. 464, S. C.†

* 2 Eng. Com. Law Reps. 488. † 1 Id. 454.

A loss occasioned by running foul of another vessel by misfortune, is a loss by the perils of the sea; *Buller v. Fisher*, 3 *Esp.* 67; so if she was run down by another ship through gross negligence. *Smith v. Scott*, 4 *Taunt.* 126. So where the vessel is wrecked in consequence of the barratry of the master. *Heyman v. Parish*, 2 *Campb.* 149. So where a portion of the goods was saved from the wreck and got on shore, but never came to the hands of the owners, *Gibbs, C. J.*, held it a total loss by the perils of the sea. *Bondrett v. Hentigg, Holt*, 149.^a So in an insurance on goods, where the ship was stranded on a shoal within a few miles of the port of destination, disabled from proceeding, and lost, but while she lay in the sand was seized by the commander of the place at which she was stranded, and the goods confiscated by him, it was held that the goods were lost by the perils of the seas. *Hahn v. Corbett*, 2 *Bingh.* 205.^a Where the insurance was on living cattle, warranted free from mortality, which, in the course of the voyage, were killed by the rolling of the ship, it was held a loss by the perils of the seas. *Lawrence v. Aberdeen*, 5 *B. and A.* 109.^a *Gabay v. Lloyd*, 3 *B. and C.* 793.^a Where a government transport had been insured for twelve months, during which she was ordered into a dry harbour, the bed of which was uneven, and the tide having left her she received damage by taking the ground, it was held to be a loss by the perils of the seas. *Fletcher v. Inglis*, 2 *B. and A.* 315.

But where a ship was hove down upon a beach, within the tide-way, to repair, and the tide rising, she was bilged and damaged, it was held not to be a loss occasioned by the perils of the seas; *Thomson v. Whitmore*, 3 *Taunt.* 227; and see *Phillips v. Barber*, 5 *B. and A.* 161;^a nor is the destruction of a vessel by worms, at sea, such a loss, *Rohl v. Parr*, 1 *Esp.* 445, nor where one English ship sinks another, by firing on her, supposing her an enemy. *Cullen v. Butler*, 5 *M. and S.* 461.^a

A loss by perils of the seas, but remotely occasioned by the negligence of the crew, is within the policy. *Walker v. Maitland*, 5 *B. and A.* 171;^a and see *Bishop v. Pentland*, 7 *B. and C.* 217.^a *Shore v. Benthall*, 7 *B. and C.* 798 (n).^a

Where a ship was disabled by perils of the seas from pursuing her voyage, and the master to defray the expense of repairs, having no other means of drawing money, sold part of the goods insured, and applied the proceeds towards the repairs, it was held that this was not a loss of the goods by perils of the seas. *Sarguy v. Hobson*, 2 *B. and C.* 71.^a 4 *Bingh.* 131.^a 1 *Y. and J.* 347, *S. C.*

A ship never heard of is presumed to have been foundered at sea. *Green v. Brown*, 2 *Str.* 1199. *Newby v. Read, Park, Ins.* 85. 6th ed. In order to recover in such case, the plaintiff must prove that the vessel sailed on the voyage insured. *Cohen v. Hinckley*, 2 *Campb.* 51. *Koster v. James, R. and M.* 333. It is sufficient to

^a 3 Eng. Com. Law Reps. 57. ^a 9 Id. 333. ^a 7 Id. 38. ^a 10 Id. 229. ^a 7 Id. 55. ^a 7 Id. 59. ^a 14 Id. 33. ^a 14 Id. 130. ^a 9 Id. 5. ^a 13 Id. 374.

prove that the ship has not been heard of in this country since the time of her sailing, without calling witnesses from the port of destination to prove that she never arrived there. *Twemlow v. Oswin*, 2 *Campb.* 85. The time within which a missing ship will be presumed lost, must be regulated by the circumstances of the case. In *Houstman v. Thornton, Holt*, 242,* a ship which had sailed on a seven weeks' voyage, and had not been heard of for eight or nine months, was presumed to be lost. Where it was proved that the vessel sailed on the voyage insured, with the goods on board, and never arrived at her port of destination, and that a few days after her departure a report was heard at the place whence she sailed that she had foundered at sea, but that the crew were saved, it was held that this was sufficient *prima facie* evidence of a loss by the perils of the seas, and that the plaintiff was not bound to call any of the crew, or to show that he was unable to procure their attendance. *Koster v. Reed*, 6 *B. and C.* 19.†

Proof of loss by fire.] Proof that the ship was burned to prevent her falling into the hands of the enemy, is evidence of a loss by fire, *Gordon v. Rimmington*, 1 *Campb.* 623. So in an insurance against "fire, barratry, &c." proof that the ship was burned by the negligence of the master and mariners will support a statement of loss by fire.* *Busk v. Roy*, *Exch. Ass.* 2 *B. and A.* 72. But in an insurance on goods, if the goods are burnt in consequence of being put on board in bad condition, it is not a loss by fire within the meaning of the policy. *Boyd v. Dubois*, 3 *Campb.* 133.

Proof of loss by capture.] Where a vessel is driven by a gale of wind on an enemy's coast, and there captured, it is a loss by capture. *Green v. Elmslie, Peake*, 212; see *Hagedon v. Whitmore*, 1 *Stark.* 157.† The books at Lloyd's are evidence of a capture, but not of notice of the loss to the underwriter. *Abel v. Potts*, 3 *Esp.* 242, *ante*, p. 112. A foreign sentence of condemnation is not evidence of a capture; but after other proof of a capture, it is evidence to show the grounds of condemnation. *Marshal v. Parker*, 2 *Campb.* 69. See *ante*, p. 103. If a ship after capture is restored, so as to be in a condition to pursue the voyage insured, and is afterwards lost on another voyage, the plaintiff cannot recover on a declaration for a loss by capture. *Kulen Kemp v. Vigne*, 1 *T. R.* 304. Proof of a capture by collusion with the captain, will support an averment of loss, either by capture or barratry. Per *Ld. Ellenborough*, *Archangelo v. Thompson*, *Campb.* 621.

Proof of loss by barratry.] Evidence that the person who acted

* 3 *Eng. Com. Law Reps.* 88. † 13 *Id.* 97. ‡ 2 *Id.* 326.

* Where fire is the proximate cause of the loss of a vessel, it is no defence to say that negligence of the master or mariners was the remote cause. *Pelapoco Ins. Co. v. Coulter*, 3 *Peters*, 222.

as master of the ship carried her out of her course for fraudulent purposes of his own, is *prima facie* evidence of barratry, without negative proof that the person so acting as master was not the owner, it lying on the underwriter to prove, in his own discharge, that he was the owner. *Ross v. Hunter*, 4 T. R. 33. Where the whole ship is let, the freighter is owner *pro hac vice*, and barratry may be committed by the general owner. *Vaŕejo v. Wheeler*, *Cowp.* 143. *Soares v. Thornton*; 1 B. Moore, 373.¹ Smuggling by the captain, on his own account, will be evidence of barratry; *Lockyer v. Offley*, 1 T. R. 252; but if, by the gross negligence of the owner, the mariners barratrously carry smuggled goods on board, the underwriters are not liable. *Pipon v. Cope*, 1 *Campb.* 434. Where prisoners of war rise and confine all the crew, and put them on shore, except one, who is heard on the deck in conversation with them, it is evidence of barratry to go to the jury. *Hucks v. Thornton*, *Holt*, 30.²

Proof of stranding.] Where goods are insured free from average, unless general, or the ship should be stranded, before the plaintiff can recover, the *stranding* must be proved. A striking is not sufficient; it is merely temporary, or as it has been vulgarly described, a touch and go; but in order to constitute a stranding, the ship must be stationary; *Per Lord Ellenborough, M'Dougall v. Royal Exch. Ass. Co.* 1 *Campb.* 131, 4 M. and S. 503, S. C. But where the ship was fixed from fifteen to twenty minutes, it was held a stranding. *Baker v. Towry*, *Id.* 437. If a ship is forced ashore, or is driven on a bank, and remains for any time upon the ground, this is a stranding without reference to the degree of damage she sustains. *Per Lord Ellenborough, Harman v. Vaux*, 3 *Campb.* 431.

"A stranding," says Mr. Justice Bayley, "may be said to take place where a ship takes the ground, not in the ordinary course of the navigation, but by reason of some unforeseen accident." *Bishop v. Pentland*, 7 B. and C. 224.³ Where a ship, under the conduct of a pilot, in her course up the river to Liverpool, was, against the advice of the master, fastened at the pier of the dock basin, by a rope to the shore, and left there, and took the ground, and when the tide left her, fell over on her side and bilged, this was held to be a stranding. *Carruthers v. Sydebotham*, 4 M. and S. 77. So, where in the course of a voyage upon an inland navigation, it became necessary, in order to repair the navigation, to draw off the water, and the ship in consequence having been placed in the most secure situation that could be found, when the water was drawn off, went by accident upon some piles, which were not previously known to be there, it was held a stranding. *Rayner v. Godmond*, 5 B. and A. 225.⁴ So, where in the course of the voyage the ship was by

¹ 2 Eng. Com. Law Reps. 238. ² 3 Id. 13. ³ 14 Id. 33. ⁴ 7 Id. 76.

tempestuous weather forced to take shelter in a harbour, and, in entering it, struck upon an anchor, and being brought to her moorings was found leaky and in danger of sinking, and on that account was hauled with warps higher up the harbour, where she took the ground and remained fast for half an hour, the stranding was held to be proved. *Barrow v. Bell*, 4 B. and C. 736.* In the following case also it was held to be a stranding. The ship was compelled in the course of her voyage to put into a tide harbour, and was there moored alongside a quay in the usual place for ships of her burden. It became necessary, in addition to the usual moorings, to fasten her by tackle to posts on the shore, to prevent her falling over upon the tide leaving her. The rope with which she was fastened, not being of sufficient length, broke, when the tide left the vessel, and she fell over upon her side, and was thereby stove in and greatly injured; this was held to be a stranding, though it might have been occasioned remotely by the negligence of the crew. Mr. Justice Bayley said, "So long as the vessel was on the ground and lashed to the posts on the shore, she was not stranded; but, when she fell over on her side, and lay on the ground in that position, she was stranded. The falling over was not in the ordinary course of the voyage, but in consequence of an unforeseen accident out of the ordinary course of the voyage, viz. the breaking of the rope." *Bishop v. Pentland*, 7 B. and C. 219.†

But where the taking the ground is no more than is usual with vessels on the same voyage, it is not a stranding; thus where a vessel took the ground in the ordinary course of the navigation, and afterwards being moored at a quay, on the ebb of the tide took the ground, fell over on her side and was injured; but the taking of the ground was stated by a witness to be no more than was usual with vessels of the same class in proceeding up the same navigation, this was held not to be a stranding. *Hearne v. Edmunds*, 1 B. and B. 388;‡ see 7 B. and C. 225.⁴

Proof of amount of loss.] Where the plaintiff declares for a total, he may give evidence of a partial loss. *Gardiner v. Crosedale*, 1 W. Bl. 198. *Rucker v. Palsgrave*, 1 Campb. 557, 1 Taunt. 419. An adjustment is proved by evidence of the signature of the underwriter, or his agent, with proof of the authority of the latter; and it seems that an agent who has authority to subscribe a policy, has also authority to sign an adjustment of the loss. *Richardson v. Anderson*, 1 Campb. 43 (n). The production by the assured of a policy of insurance with an adjustment on it, and the name of the defendant struck off the policy, is not evidence of the payment to the assured of the sum adjusted. *Adams v. Sanders*, 1 M. and M. 373, 4 C. and P. 25, S. C.⁵ An adjustment is only *prima facie* evidence against the underwriter, and does not bind him, unless there

* 10 Eng. Com. Law Reps. 451. † 14 Id. 33. ‡ 5 Id. 139. § 14 Id. 35.
 ¶ 19 Id. 257.

was a full disclosure of the circumstances of the case; *Shepherd v. Chewter*, 1 Campb. 274; and fraud opens an adjustment. *Christian v. Coombe*, 2 Esp. 489. An adjustment does not require a stamp. *Wiebe v. Simpson*, 2 Selw. N. P. 917, 4th ed. In an action on insurance of goods, if the declaration allege the ship to have been sunk, whereby the goods were spoiled, and it appear that some of the goods were saved, the plaintiff may give the expense of salvage in evidence, though not specifically averred. *Cary v. King*, Rep. temp. Hard. 304. Salvage on the re-capture of a ship must be proved by producing the proceedings of the admiralty court ascertaining the amount. *Thellusson v. Shedden*, 2 N. R. 229. In open policies the assured must prove the extent of his loss; but in valued policies, if the loss be a total one, he is only bound to prove *some* interest in the ship or goods, in order to take the case out of the statute 19 Geo. II. c. 37, for ever since that statute, the constant usage has been to permit the valuation fixed in the policy to stand, unless the defendant can show that the plaintiff had a colourable interest only, or that he has greatly overvalued the goods. But where the loss is partial it opens a valued policy, and the plaintiff is as much bound to prove the value of the goods that have been lost, and to ascertain the damage he has sustained by the loss, as in case of an open policy. 2 Saund. 201 (n).

The certificate of an agent of Lloyd's, resident abroad, is not admissible to prove the amount of damage sustained by goods, though the defendant is a subscriber to Lloyd's. *Drake v. Marryatt*, 1 B. and C. 473.*

Proof of amount of loss—abandonment.] Before the plaintiff can recover for a total loss, it is necessary in some cases to prove an abandonment. "The late cases show that a mere loss of the adventure by retardation of the voyage without loss of the thing insured, either by its being actually taken from the ship or spoiled, does not constitute a total loss, under a policy of insurance, unless by the aid and effect of an abandonment." *Per Ld. Tenterden*, *Naylor v. Taylor*, 9 B. and C. 723,* citing *Anderson v. Wallis*, 2 M. and S. 240, and *Holdsworth v. Wise*, 7 B. and C. 794.† In order to justify an abandonment, there must have been *that* in the course of the voyage, which at the time, constituted a total loss. Thus, capture or the necessary desertion of a ship constitutes a total loss. *Per Bayley, J.*, *Holdsworth v. Wise*, 7 B. and C. 799.‡ The effect of an abandonment, therefore, is to prevent a loss at the time total, from becoming, by the operation of subsequent circumstances, partial.

An abandonment may be by parol, but it should be certain, and therefore a statement of the facts, a request to settle for a total loss, and to direct the disposal of the ship, have been held insufficient.

* 8 Eng. Com. Law Reps. 137. † 17 Id. 482. ‡ 14 Id. 129.

Parmeter v. Todhunter, 1 *Campb.* 541. The notice of abandonment must be given within a reasonable time. *Read v. Bonham*, 3 *B. and B.* 147;^{*} *Hunt v. Royal Exchange Assurance*, 5 *M. and S.* 47. *Hudson v. Harrison*, 3 *B. and B.* 106.⁴ So the underwriter is bound to say, within a reasonable time after receiving notice of abandonment, whether he will accept it or not. *Hudson v. Harrison*, 3 *B. and B.* 97.⁴ A party jointly interested in the subject matter of the insurance, and who has effected the insurance, may give notice of abandonment for all. *Hunt v. the Royal Exchange Assurance*, 5 *M. and S.* 47.

Where the damage sustained makes the loss a total loss, as where a ship is reduced to a mere wreck so as not to be worth repairing, it is unnecessary to prove a notice of abandonment. *Cambridge v. Anderton*, 2 *B. and C.* 691,^{*} *R. and M.* 61, *S. C.*

Defence.

Under the general issue the defendant may show that the plaintiff is not entitled to recover, on account of fraud, or misrepresentation, or concealment of circumstances, or non-compliance with representations, or non-compliance with a warranty.

Fraud, misrepresentation, or concealment.] If the assured conceals any material fact which relates to the ship, the policy is void. *Carter v. Boehm*, 3 *Burr.* 1905. And the assured is bound to communicate all the information he has received, though he does not know it to be true, and it afterwards turns out to be false. *Lynch v. Hamilton*, 3 *Taunt.* 37. It is sufficient to communicate facts, without the opinion or conclusion founded upon these facts. *Bell v. Bell*, 2 *Campb.* 475; see *Durrel v. Bederley*, *Holt*, 283.[†] Underwriters may, as it seems, be called to state their opinion, as to whether the communication would have varied the terms of insurance. *Berthon v. Loughman*, 2 *Stark.* 258,^{*} *ante*, p. 98, and see 3 *Stark. Ev.* 1175, but see *Durrell v. Bederley*, *Holt*, 286,[†] *contra*. It is a question for the jury whether any particular fact is or is not material. *Lindenau v. Desborough*, 8 *B. and C.* 586.[‡] It is sufficient if a representation be substantially performed, and not like a warranty, strictly and literally. *Parson v. Watson*, *Cowper*, 785. And it has been ruled by Lord Tenterden, that the mere fact of a misrepresentation, without fraud, will not be enough to prevent the plaintiff's recovery; for the contract between the parties is the policy which is in writing, and cannot be varied by parol. *Flinn v. Tobin*, 1 *M. and M.* 367.

In an action against a second or subsequent underwriter, it is the practice to admit evidence of representations to the first underwriter, on a presumption that the subsequent underwriters give credit to such representations. *Ibid.* *Marsden v. Reid*, 3 *East*, 573. *Stackpole v. Simon*, *Park's Ins.* 583, 6th ed. The rule is con-

^{*} 7 Eng. Com. Law Reps. 384. ⁴ 7 Id. 364. ^{*} 9 Id. 224. [†] 3 Id. 104.

[‡] 3 Id. 340. [‡] 15 Id. 306.

finer to representations made to the first underwriter (that is, the first on the policy), *Ibid.* *Bell v. Carstairs*, 2 *Campb.* 543, and is, it seems, to be taken with great qualifications, and with regard to the time and circumstances under which the communication was made. *Forrester v. Pigou*, 1 *M. and S.* 9.

Fraud.] If goods are fraudulently over-valued, with intent to defraud the underwriters, the contract is void, and the assured cannot recover even for the value actually on board. *Haigh v. De la Cour*, 3 *Campb.* 319.

Deviation.] A deviation from the voyage insured is a defence to an action on the policy. Where the insurance is on a voyage to a given place, and the captain when he sails does not mean to go to that place at all, he never sails on the voyage insured. But where the ultimate *termini* of the intended voyage are the same as those described in the policy, although an intermediate voyage be contemplated, the voyage is to be considered the same until the vessel arrives at the dividing point of the two voyages. The departure from the course of the voyage insured then becomes a deviation; but before the arrival at the dividing point there is no more than an intention to deviate, which, if not carried into effect, will not vitiate the policy. *Per Bayley, J., Hare v. Travis*, 7 *B. and C.* 17.¹

Non-compliance with warranties.] The defendant may defeat the plaintiff's claim, by showing a non-compliance with a warranty, either express or implied, *vide ante*, p. 180.

As to the want of proper stamp, and an alteration in the policy, *vide ante*, p. 128.

Competency of Witnesses.

An underwriter is a competent witness for another underwriter, who has subscribed the same policy, *Bent v. Baker*, 3 *T. R.* 27, unless he has entered into the consolidation rule, or has paid the loss upon an agreement to be re-paid in case the plaintiff fails. *Forrester v. Pigou*, 1 *M. and S.* 14. In an action on insurance of goods, the owner of the vessel is not a competent witness to prove the seaworthiness of the ship, for he would be liable to the plaintiff, if un-seaworthy. *Rotheroe v. Elton, Peake*, 84. So the captain is not a competent witness for the defendant, to disprove the charge of barratry. *Bird v. Thompson*, 1 *Esp.* 339. But in an action on a policy on goods, where the ship was lost by putting into a port out of the line of the voyage, it was held that the captain, who was also part owner, was competent to prove that the ship originally sailed on the voyage insured, by the direction of the owner of the goods, though not to prove that the deviation was justified by

¹ 14 *Eng. Com. Law Reps.* 4.

necessity. *De Symonds v. De la Cour*, 2 Bos. and P. N. R. 374. See also *Taylor v. M'Vicar*, 6 Esp. 27. One who is jointly interested in the property, whether at the time of effecting the policy, see *De Symonds v. Shedden*, 2 Bos. and Pul. 155, or afterwards, *Perchard v. Whitmore*, *Ibid.* (n), is an incompetent witness for the plaintiff. The captain's protest is not admissible evidence of the facts there stated, but may be read for the purpose of contradicting his testimony. *Senat v. Potter*, 7 T. R. 158. *Christian v. Coombe*, 2 Esp. 490.

ASSUMPSIT ON WARRANTY OF A HORSE.

When a horse has been sold, and warranted sound, but is in fact unsound, the purchaser may maintain an action upon the warranty, or, in some cases, may rescind the contract, and recover the money paid, under the count for money had and received. Thus, where by the contract the purchaser has the power of returning the horse, should it prove unsound, and does return it, or offers to do so, the contract is at an end, and money had and received will lie. *Towers v. Barrett*, 1 T. R. 133. So, where the contract is rescinded with the assent of the defendant. *Per Buller, J., ib.* But the purchaser must return the horse within a reasonable time; *Dr. Compton's case*, cited 1 T. R. 136; and see *Adam v. Richards*, 2 H. B. 574; and he must return him in the same state as sold, and not diminished in value by doctoring, &c. *Curtis v. Hannay*, 3 Esp. 82. See 5 *East*, 452. Where a horse was warranted sound, and the vendor said, in a subsequent conversation, that if the horse were unsound he would take it again and return the money, it was held that the original contract was not abandoned, and that assumpsit for money had and received could not be maintained by the purchaser, the horse not being taken back. *Payne v. Whale*, 7 *East*, 274. If the plaintiff sues for money had and received, he must prove the purchase, and warranty, and power to rescind (and, for this purpose, show a breach of the warranty, if necessary), and also the rescinding of the contract by returning the horse.

Where the plaintiff proceeds on the contract of warranty, he must prove, 1. The contract, viz. the consideration and the promise; 2. The breach of the warranty; and, 3. The damage sustained.

The consideration.] This is usually proved by the production of the receipt. If the defendant took another horse in part payment, it is no variance to state that the whole price was paid in money. *Hands v. Burton*, 9 *East*, 349, *Brown v. Fry*, *Schw. N. P.* 630; but see *Harris v. Fowle*, cited 1 H. B. 287. If an agent sell to A. two horses belonging to B. and C., and warrant them, A. must not declare as upon the sale of one horse, the contract being entire.

Symonds v. Car, 1 *Campb.* 361. Where the declaration stated the contract to be, that in consideration the plaintiff would buy of the defendant a horse for a certain price, to wit, 55*l.*, the defendant undertook that the horse was sound, and the contract proved was that the defendant warranted the horse sound, and agreed to give 1*l.* back if the horse did not bring the plaintiff 4*l.* or 5*l.*, this was held a fatal variance. *Blyth v. Bampton*, 3 *Bingh.* 472,* *Gaselee, J., diss.*

The promise or warranty.] The plaintiff must prove an express warranty, a high price not being tantamount thereto. *Parkinson v. Lee*, 2 *East*, 322. Where the plaintiff wrote to the defendant, "You will remember that you warranted a horse as a five-year old, &c." to which the defendant answered, "The horse is as I represented it," it was ruled that this was sufficient evidence for the jury to infer a warranty at the time of sale. *Salmon v. Ward*, 2 *C. and P.* 211.¹ If the seller says, "The horse is sound to the best of my knowledge, but I will not warrant it," and the seller knows it to be unsound, he is answerable on this qualified warranty. *Wood v. Smith*, 4 *C. and P.* 45,* 1 *M. and M. MSS. S. C.* Where the warranty was, "To be sold, a black gelding, five years old—has been constantly driven in the plough—warranted," this was held to be only a warranty of soundness. *Richardson v. Brown*, 1 *Bingh.* 344,* 8 *B. Moore*, 338, *S. C.* A servant employed to sell a horse, has an implied authority to warrant; *Alexander v. Gibson*, 2 *Campb.* 555; and even though the servant have express directions not to warrant, but does warrant, the master, it is said, is bound, because the servant, having a general authority to sell, is in a condition to warrant, and the master has not notified to the world that the general authority is circumscribed. *Per Bayley, J., Pickering v. Busk*, 15 *East*, 45; see *Helyear v. Hawke*, 5 *Esp.* 75. But this doctrine has been confined to the cases of sales by servants of horse-dealers, whomay be supposed to possess a general authority. *Bank of Scotland v. Watson*, 1 *Dow*, 45; and see *Fenn v. Harrison*, 6 *T. R.* 760, *Anon. case, cited* 15 *East*, 407. What is said by the servant at the time of sale is evidence, but an acknowledgment at another time is not so, and the servant must be called. *Helyear v. Hawke*, 5 *Esp.* 72. A receipt for the price, containing the warranty, is admissible to prove the latter, though only bearing a receipt stamp. *Skrine v. Elmore*, 2 *Campb.* 407.

* Where the plaintiff declared on a warranty that the horse was sound, and the warranty proved was, that the horse was sound everywhere, except a kick on the leg, it was held a fatal variance. *Jones v. Cowley*, 4 *B. and C.* 445.*

Breach of the warranty.] The plaintiff must give positive proof

¹ 13 *Eng. Com. Law Reps.* 57. ¹² *Id.* 94. ¹⁹ *Id.* 267. • • 8 *Id.* 339.

• 10 *Id.* 377.

that the horse was unsound, &c. at the time of the sale; a suspicion that the horse was unsound is not sufficient. *Eaves v. Dixon*, 2 Taunt. 343. It was ruled by Lord Ellenborough, that any infirmity, as a temporary lameness, which renders a horse less fit for present use or convenience, though not of a permanent nature, and though removed after action brought, was an unsoundness. *Elton v. Jordan*, 4 Campb. 281. 1 Stark. 127,^p S. C. But in *Garment v. Barrs*, 2 Esp. 673, it was ruled by Eyre, C. J., that a horse labouring under a temporary injury or hurt, which is capable of being speedily cured or removed, is not an unsound horse. Roaring is not, it is said, necessarily unsoundness, unless symptomatic of disease; *Basset v. Collis*, 2 Campb. 523; but if it is of such a nature as to incommode the horse when pressed to his speed, it is an unsoundness. *Onslow v. Eames*, 2 Stark. 81.^a A nerved horse is unsound. *Best v. Osborne, R. and M.* 290. A cough, if of a permanent nature, is an unsoundness, *Shillitoe v. Claridge*, 2 Chitty's R. 425;^r see 1 Stark. 127;^p but crib-biting is no unsoundness. *Broenenburg v. Haycock*, Holt, 630.^a Whether thrushes, splints, or quidding, be an unsoundness, is a disputed question. 2 Campb. 524 (n.) So the being "chest foundered." *Atterbury v. Fairmanner*, 8 B. Moore, 32.^c It need not be averred, nor, if averred, proved, that the defendant knew of the unsoundness. *Williamson v. Allison*, 2 East, 446. Proof that a horse is a good drawer will not satisfy a warranty that he is "a good drawer, and pulls quietly in harness." *Colthird v. Puncheon*, 2 D. and R. 10.^a

Damage.] If the horse has been returned, the plaintiff will be entitled to recover the whole price; if kept, the difference between the value and the price; or the plaintiff may sell the horse for what he can get, and recover the residue of the price in damages. *Caswell v. Coare*, 1 Taunt. 566. If the horse is not tendered to the vendor, the vendee can recover no damages for the expense of his keep, *ibid.*; but where the seller, rescinded the contract, it was held that he was liable for the keep of the horse from the time of the contract; *King v. Price*, 2 Chitty, 416;^r though for such space of time only as would be required to re-sell the horse to the best advantage. *McKenzie v. Hancock, R. and M.* 436. Where A. warranted a horse to B., who re-sold him with a warranty to C., and the horse proving unsound, C. sued B., who gave notice to A. of the action, and offered him the option of defending it, but A. not giving any answer, B. defended the action, and failed, it was held that A. was liable in an action on the warranty, for the costs of the action brought by C. against B. *Lewis v. Peake*, 7 Taunt. 153,^v 2 Marsh. 431, S. C.

Competency of witness.] It has been held, that a former propri-

^p 2 Eng. Com. Law Reps. 324. ^q 8 Id. 255. ^r 18 Id. 386. ^s 3 Id. 207.

^t 17 Id. 99. ^u 16 Id. 55. ^v 18 Id. 333. ^w 2 Id. 54

etor of a horse, who has sold him with a warranty to the plaintiff, is a competent witness for the defendant, to prove that the horse was, at the time of the sale by himself, sound; for it does not appear that the horse was unsound at that time, and unless it were, the witness would not be liable to the defendant; *Briggs v. Crick*, 5 Esp. 99; but see 2 Phill. Ev. 114, and *quære*, for unless the testimony as to the soundness at the time of the former sale, tended to prove soundness at the time of the latter sale, it would be irrelevant. If, on the other hand, the testimony of the soundness at the time of the first sale tends to proof of soundness at the time of the second, then the witness seeks to establish a fact in which, if he failed, damages would be recovered, to which he would, it seems, be liable, on negating the fact which he attempted to prove, viz. the soundness at the time of the first sale. 3 Stark. Ev. 1647 (n), and see *Lewis v. Peake*, *supra*.

ASSUMPSIT ON PROMISE OF MARRIAGE.

To maintain this action, the plaintiff must prove, 1, the promise of the defendant as stated, and, 2, the breach. The promises must be mutual, the reciprocity constituting the consideration, 1 *Roll. Ab.* 1, 5, 22. Either a man or woman may sue for breach of promise of marriage, although an attempt was made in *Harrison v. Cage*, 5 Mod. 511, to resist the action on the ground that marriage is not an advancement for a man. As in other cases an infant may enforce an advantageous contract, although not bound thereby, so an infant may sue a person of full age for breach of promise of marriage. *Holt v. Ward*, 2 Strange, 937, *Warwick v. Bruce*, 2 M. and S. 209. This action falls within the general rule *actio personalis meretur cum personâ*; and cannot be maintained by an executor or administrator, unless perhaps under peculiar circumstances, whereby a strict pecuniary loss has accrued to the party deceased, and the personal estate been endamaged accordingly, which special damage must be stated on the record, for it will not be intended. *Chamberlain v. Walker*, 2 M. and S. 416.

Proof of the contract.] In an early case (*Philpot v. Wallet*, Skin. 24, 3 Lev. 65, S. C.) it was held, that mutual promises to marry come within the fourth section of the statute of frauds; and the rule was so stated by Lord Chief Baron Comyn in the Digest (*Action on the case*, F. 3); but in *Bull. N. P.* 280, a contrary doctrine is laid down, for which the authority of *Cork v. Baker*, 1 Strange, 34, is cited. This case, as well as that of *Harrison v. Cage*, 1 *Ld. Raymond*, 386, has been animadverted upon by Mr. Phillips in vol. 2. of his Evidence, page 73, 5th edition. He, however, concludes by stating the better opinion to be, and it is universally agreed upon at this day, that the promises need not be in writing. Should,

however, written evidence of the contract be produced, no stamp is required. *Orford v. Cole*, 2 Stark. 351.* A promise on the part of a woman may be presumed from such circumstances of acquiescence, or tokens of approval, as ordinarily attend the acceptance of an offer of marriage; her presence when the offer was made, and the consent of parents asked, without her making any objection; her subsequent reception of the suitor's visits, and concurrence in the arrangements for the wedding; her carrying herself as one consenting and approving, for her express consent in words is not necessary. *Daniel v. Bowles*, 2 C. and P. 554.† *Hutton v. Mansell*, 3 Salk. 16. But to prove a promise by a man, undoubtedly more would be necessary, neither the usages of society nor considerations of delicacy interfering, to restrain an explicit declaration on his part. A promise to marry generally is in law a promise to marry within a reasonable time; and although a special promise to marry at a particular time, varying from that stated on the record, should be proved in evidence, it may be left to a jury to infer from the circumstance a promise to marry generally. *Potter v. Deboos*, 1 Stark. 83.‡ *Phillips v. Crutchley*, 3 C. and P. 178,§ 1 *Moore and P.* 239.¶

The breach of the promise.] To prove the breach of the promise, evidence must be given either that the defendant has married another, so that the performance of the promise is no longer possible, or that a tender has been made by the plaintiff, followed by a refusal on the part of the defendant. For this purpose it has been held sufficient, that the father of a female plaintiff demanded of the defendant, if he meant to perform his engagement with his daughter, and that the defendant replied, "Certainly not." *Gough v. Farr*, 2 C. and P. 631.° Any conduct or circumstances evincing the readiness of the one party, and the contrary determination of the other, would be evidence of a tender and refusal to lay before a jury.

Defence.

If, after entering into a contract of marriage, either party discover gross immorality, or depraved conduct in the other, evidence to that effect may be given in bar of the action; thus brutal and violent conduct in the man, accompanied with threats of ill usage to the woman, go to the ground of the action; *Leeds v. Cook*, 4 Esp. 258; and if a man has been paying his addresses to one that he supposes a modest person, and he afterwards discovers her to be with child, (not by himself,) or to be a loose and immodest woman, and on such account he refuses to fulfil any promise of marriage he may have made her, he is justified in so doing. *Irving*

* 3 Eng. Com. Law Reps. 378. † 12 Id. 258. ‡ 2 Id. 305. § 14 Id. 260.
 ¶ 17 Id. 179. • 12 Id. 293.

v. Greenwood, 1 C. and P. 350.⁴ *Baddeley v. Mortlocke, Holt*, 151.⁵ But if a man knowingly promise to marry a loose and immodest woman, he is bound by such promise. *Per Lord Tenterden, ibid.* To entitle the defendant to a verdict, on the ground of the bad character of the plaintiff, it is not sufficient to show that charges (as of pecuniary dishonesty and perjury) were made against him, which he promised, but failed to explain. The defendant must go further, in order to bar the action, and show that the charges were founded, and that the plaintiff's character was bad. *Baddeley v. Mortlocke, Holt*, 151.⁶ In reduction of damages, any circumstances in the character of the plaintiff, leading the jury to a just appreciation of the loss for which compensation is sought, may be proved; as also the disapprobation of the match expressed by the parents of the defendant, to prove which, (the father being an incompetent witness by reason of his having employed the attorney,) Lord Tenterden allowed one of the other relations to be called. *Irving v. Greenwood*, 1 C. and P. 350.⁷ To show the general bad character of the plaintiff, a witness may state what has been said by third persons; and it is not necessary to produce those persons. *Foulkes v. Selhway*, 3 Esp. 238, *supra*. If by misrepresentation, or wilful suppression of the real circumstances of the family and previous life of the plaintiff, the defendant be induced to enter upon or continue the treaty of marriage, it is a good defence to the action. *Wharton v. Lewis*, 1 C. and P. 531.⁸ Should the defendant's counsel intimate by his course of cross-examination of plaintiff's witnesses, that the practice of deception is imputed to the plaintiff, the plaintiff's counsel ought, upon such notice, before closing his case, to offer the evidence, rebutting such imputation. *Ibid.* If a female plaintiff know that her father is making, by letter, representations to the defendant respecting her, his letters are evidence for the defendant, to show deceit on her part, although she will not be answerable for particular expressions; but a representation made orally by the father to a third person, in the absence of the plaintiff, and by such person communicated to the defendant, is not admissible. *Foote v. Hayne*, 1 C. and P. 547.⁹

ASSUMPSIT ON AN AWARD.

In assumpsit on an award, the plaintiff must prove the submission and award in the manner before stated, *ante*, p. 76, and the performance by himself of any conditions precedent. Where the submission has been by a judge's order, which has been made a rule of court, it is sufficiently proved by production of the rule. *Still v. Halford*, 4 Campb. 17. If the time for making the award has been enlarged, and the award made within the enlarged time, the plain-

⁴ 11 Eng. Com. Law Reps. 412. • 3 Id. 57. • 3 Id. 57 • 11 Id. 412.

⁵ 11 Id. 459. • 11 Id. 466.

tiff must show that the enlargement was duly made, according to the terms of the submission or by the consent of the parties. But if the enlargement was irregularly made, such irregularity is waived by the appearance of the parties before the arbitrator after the enlargement. *Re Hick*, 8 Taunt, 694.¹ *Halden v. Glasscock*, 8 Dow. and Ry. 151. *Laurence v. Hodgson*, 1 Y. and J. 16. The plaintiff need not prove that the defendant had notice of the award, for he is bound to take notice of the award, as well as the plaintiff. 2 Saund. 62 a (n).

Defence.

The defendant, under the general issue, may object to the sufficiency of the award; or that there is a variance between the award declared on, and that produced in evidence. But corruption or misconduct of the arbitrators cannot be given in evidence, at least where, for such corruption or misconduct, application might have been made to the court to set such award aside. *Wells v. Maccarmick*, 2 Wils. 148. *Braddick v. Thompson*, 8 East, 344. *Watson on awards*, 224, and see *Brazier v. Bryant*, 3 Bingh. 167.*

ASSUMPSIT ON AN ATTORNEY'S BILL.

In an action upon an attorney's bill, the plaintiff must prove,¹ 1. His retainer by the defendant, which may be proved by showing that the defendant attended at his office, and gave directions; 2. That the business was done, which may be proved by a clerk, or other agent, who can speak to the existence of the causes and the business in respect of which the charges are made, and can prove the main items, *Anon. Esp. D. N. P.* 10, without proving the several items to have been done. *Phillips v. Roach, Esp. D. N. P.* 10. If there are no taxable items in the bill, it will also be necessary to give general evidence of the reasonableness of the charges. Proof of a judge's order, referring the bill to be taxed, and of the defendant's undertaking to pay what shall appear to be due, and of the master's allocatur, will be sufficient proof, both of the retainer and of the business having been done. *Lee v. Jones*, 2 Campb. 496. 3. Where the demand is for fees, charges, or disbursements, at law or in equity, he cannot recover until the expiration of one month (a lunar month, *Hurd v. Leach*, 5 Esp. 164) or more after he has delivered to the party or parties to be charged therewith, or left for him or them, at his or their dwelling-house, or last place of abode, a bill of such fees, charges, and disbursements, subscribed with the proper hand of such attorney or solicitor, 2 G. II. c. 23. s. 23; and he must, therefore, prove the delivery of such bill. Intel-

¹ 4 Eng. Com. Law Reps. 249. * 11 Id. 82.

ligible abbreviations will not vitiate the bill. *Reynolds v. Caswell*, 4 Taunt. 193. *Frowd v. Stillard*, 4 C. and P. 51.¹

Costs, charges, and disbursements.] Where the demand is partly for taxable items, and partly for items not taxable, it has been held that the plaintiff may recover for charges or disbursements not taxable, provided he has delivered no bill at all, but where he has delivered a bill irregularly he cannot; and, therefore, where a single item for business done in court is inserted in the bill, it must be proved to have been signed and delivered according to the statute. *Winter v. Payne*, 6 T. R. 645. *Mowbray v. Fleming*, 11 East, 285. *Tidd*, 329, 8th ed. *Weld v. Crawford*, 2 Stark. 538.² And where the plaintiff had been employed in defending a cause, and had done other business not taxable, and had delivered separate bills, Lord Tenterden ruled that all ought to have been included in one bill, and that the second bill ought to have been delivered a month before the action. *Thwaite v. Mackerson*, 1 M. and M. 199. But it seems that where a bill is delivered according to the statute, containing various taxable items, one item of which is not sufficiently described, according to the provisions of the statute, the plaintiff may still recover the residue of the bill. *Drew v. Clifford*, R. and M. 280. Taxable items have been held to be, preparing a warrant of attorney, *Sandom v. Bourne*, 4 Campb. 68, but see *Burton v. Chatterton*, 3 B. and A. 488,³ see also *Wilson v. Gutteridge*, 3 B. and C. 157,⁴ *Weld v. Crawford*, 2 Stark. 538;⁵ a *dedimus potestatem*, *Ex-parte Prickett*, 1 N. R. 266; preparing an affidavit to hold to bail. *Winter v. Payne*, 6 T. R. 645. So items for attending and examining bail, and attending the plaintiff in several actions against the defendant, and arranging to take cognovits therein, are taxable items. *Watt v. Collins*, R. and M. 284. So the obtaining a bankrupt's certificate. *Collins v. Nicholson*, 2 Taunt. 321. See *Ford v. Webb*, 3 B. and P. 241. So attending at a lock-up-house and obtaining the defendant's release and filling up the bail bond. *Fearne v. Wilson*, 6 B. and C. 87.⁶ So where the attorney proceeds only for costs out of pocket. *Miller v. Towers*, Peake, 102. But a bill for conveyancing alone is not taxable, *Anon. Tidd*, 329; nor is preparing an affidavit of petitioning creditor's debt and bond to the chancellor, for a commission of bankrupt, a taxable item, the affidavit having never been sworn, nor the commission issued; *Burton v. Chatterton*, 3 B. and A. 486;⁷ nor searching at the judgment office, *Fenton v. Correa*, 2 C. and P. 145,⁸ R. and M. 262, S. C.; and money paid by an attorney in consequence of his undertaking to pay debt and costs, is not a disbursement within the statute. *Protheroe v. Thomas*, 6 Taunt. 196.⁹ Where a bill contains taxable articles and a separate demand for money lent, the latter may be recovered, though the bill was not regularly

¹ 19 Eng. Com. Law Reps. 368. ² 3 Id. 465. ³ 5 Id. 353. ⁴ 10 Id. 42.

⁵ 13 Id. 108. ⁶ 12 Id. 21. ⁷ 1 Id. 355.

signed. *Hemmings v. Wilton*, 1 *M. and M.* MSS. s. v. *Hill v. Humphreys*, 2 *Bos. and Pull.* 343. *Benton v. Garcia*, 3 *Esp.* 149. A distinction seems to be taken in these cases between items which have no reference to the plaintiff's professional character, and items which, though not *taxable*, have such reference; and in the former case it seems that he may recover though a bill may have been irregularly delivered. See also *Miller v. Towers, Peake*, 102.

A bill must be delivered, under the statute, for business done, at the quarter-sessions, *Clarke v. Donovan*, 5 *T. R.* 694; or the insolvent court. *Smith v. Wattleworth*, 4 *B. and C.* 364.* So a bill for business done in a criminal suit in the court of Great Sessions of Caermarthen, is taxable. *Lloyd v. Maund, Tidd*, 330, but see 2 *Meriv.* 500. But business done in the House of Lords on the prosecution of an appeal is not taxable. *Williams v. Odell*, 4 *Price*, 279.

Delivery of the bill.] The bill should not only be delivered, but left with the defendant. *Brooks v. Mason*, 1 *H. B.* 290. Showing and explaining the bill, without a regular delivery, is not sufficient. *Crowder v. Shee*, 1 *Campb.* 437. It is not sufficient to prove that the bill was delivered at a particular place (not shown to be the defendant's abode), and that the defendant afterwards delivered it to his attorney's clerk. *Eicke v. Nokes*, 1 *M. and M.* 305. An indorsement on the bill, in the handwriting of the plaintiff's clerk, since dead, proved to have existed at the time of the date, and stating that a copy was on such a day delivered to the defendant, together with proof that it was the clerk's duty to deliver the bill, and that such an indorsement was usually made in the course of business, will be sufficient *prima facie* evidence of the due delivery. *Champneys v. Beck*, 1 *Stark.* 404.†

To whom.] A personal service is not necessary, but a delivery to an agent appointed by the party to receive it, will be sufficient. *Per Lord Ellenborough, Finchett v. How*, 2 *Campb.* 277. Thus the delivery of the bill to the attorney of the party is good. *Warren v. Cunningham, Gow*, 71.‡ *Vincent v. Staymaker*, 12 *East*, 372, diss. *Ld. Ellenb.* So a delivery to one of several persons who has been authorised to act for the others, is a delivery to all, *Finchett v. How*, 2 *Campb.* 277, and seems sufficient in an action against any one of them. *Crowder v. Shee*, 1 *Campb.* 437. Thus where an attorney had been retained jointly by several parties to defend several suits against each, in the subject matter of which they had a common interest, it was held that the delivery of a bill to one, was sufficient to enable the plaintiff to maintain a joint action against all. *Ozenham v. Lemon*, 2 *D. and R.* 461.¶ As to the joint retainer, see *Hellings v. Gregory*, 1 *C. and P.* 627.¶

* 10 Eng. Com. Law Reps. 358. † 2 Id. 445. ‡ 5 Id. 468. ¶ 16 Id. 103.

¶ 11 Id. 500.

At what time.] The bill must be proved to have been delivered one (lunar) month before the commencement of the action. The Nisi Prius record will be sufficient *prima facie* evidence, when made up of a term commencing more than one month after the delivery of the writ, that the action has not been brought too soon, and will make it incumbent on the defendant, if the fact was so, to prove that the action was commenced too soon, by producing a copy of the writ. *Webb v. Pritchett*, 1 B. and P. 263, *Rhodes v. Gibbs*, 5 Esp. 163, or the declaration. *Harris v. Orme*, 2 Campb. 497 (n). The time of the issuing of the writ may also be proved by the parol evidence of the plaintiff's attorney, without producing the writ or a copy. *Lester v. Jenkins*, 8 B. and C. 339,* 2 M. and R. 439, S. C. The record in all the courts is entitled of the term in which issue is joined, but in K. B., in actions *by bill*, and in the Exchequer, a memorandum is added of the term in which the declaration was filed; and if the first day of that term should be within one month after the delivery of the bill, the Nisi Prius record will not be sufficient proof, unless the memorandum be special, stating the precise day on which the bill was filed. See 2 Saund. 1 b. (n), and *Wooldridge v. Wooldridge*, 2 M. and R. 431 (n).

At what place.] Leaving the bill at the defendant's counting-house is not sufficient. *Hill v. Humphreys*, 2 B. and P. 348. It seems that it is sufficient to leave it at his last known place of abode. It is not sufficient for the defendant to show, that he had left that place of abode, without also showing, that he had a later known place of abode. *Wadson v. Smith*, 1 Stark. 324.†

Proof of the bill.] The bill may be proved by a copy or duplicate original, without any notice to produce the bill delivered. *Anderson v. May*, 2 B. and P. 237. *Colling v. Treweek*, 6 B. and C. 394,* see *Philipson v. Chase*, 2 Campb. 110. A mistake in the date of the items which does not mislead, will not vitiate the delivery of the bill. *Williams v. Barber*, 4 Taunt. 906.

Cases in which a bill need not be delivered.] A bill signed according to the statute, need not be delivered, though containing taxable items, when it is due from one attorney or solicitor to another attorney or solicitor; 12 Geo. II. c. 13, s. 6; though the defendant only became an attorney after the business was done. *Ford v. Maxwell*, 2 H. Bl. 589. *Wildbore v. Bryan*, 8 Price, 677. Nor need the executor or administrator of an attorney deliver a bill. 1 Barnard K. B. 433. *Barrett v. Moss*, 1 Carr. and P. 2.* To set-off the bill, it need not have been delivered a month; it is sufficient to deliver it in time for the plaintiff to have it taxed be-

* 15 Eng. Com. Law Reps. 232. † 2 Id. 410. * 15 Id. 208. * 11 Id. 296.

fore the trial; *Martin v. Wender*, Dougl. 199 (n). *Tidd*, 335; but see *Murphy v. Cunningham*, 1 Anstr. 198, *contra*; and *Bulman v. Berkett*, 1 Esp. 449, where it is said by Lord Kenyon, that when an attorney means to avail himself of his bill for business done, and to give it in evidence, he must deliver a bill signed to the plaintiff, but that it is not necessary that a month's time should intervene between the delivery and the action.

Defence.

Where a bill has been delivered containing taxable items, the defendant cannot object to the reasonableness of the charges at the trial. *Anderson v. May*, 2 B. and P. 237. *Tidd*, 345. *Lee v. Wilson*, 2 Chitty's R. 65.^b The delivery of a former bill is conclusive evidence against an increase of charge on any of the same items contained in a subsequent bill, and strong presumptive evidence against any additional items; but real errors or omissions are to be allowed for. *Loveridge v. Botham*, 1 B. and P. 49. The plaintiff's negligence in the conduct of the business, cannot be set up as a defence, *Templer v. McLachlan*, 2 N. R. 136. *Pasmore v. Birnie*, 2 Stark. 59,^c unless it has been such as to deprive the defendant of all benefit, and the charges sought to be recovered have been occasioned by the plaintiff's want of proper caution; *Montrou v. Jefferies, R. and M.* 317, 2 C. and P. 113,^d S. C.; but if there are other causes conducing to the loss of the benefit besides the plaintiff's negligence, the negligence is no defence to the action. *Dax v. Ward*, 1 Stark. 409.^e And it is no defence in an action for business done in defending a suit, that the plaintiff was instructed to put in a plea in abatement, for delay, which he neglected to do, whereby the defendant had judgment against him. *Johnson v. Alston*, 1 Campb. 175.

It is a good defence that the plaintiff resides at a considerable distance from the place where his business is carried on, and that in fact the business is transacted there by his articulated clerk. *Taylor v. Glassbrook*, 3 Stark. 75.^f *Hopkinson v. Smith*, 1 Bingh. 13.^g So it is a good defence that the plaintiff undertook the cause gratis; and the declarations of his clerk, when he attended to tax the costs in such cause, are evidence for the defendant. *Ashford v. Price*, 3 Stark. 185,^h 1 D. and R. N. P. C. 48, S. C.

The defendant may prove that the plaintiff has neglected to take out his certificate, by which his admission has become void. 37 Geo. II. c. 90, s. 31. But where, in an action brought by an attorney in 1825, the defendant proved that the plaintiff had not taken out any certificate during the years 1814, 1815, 1818, 1819, and 1820, but did not prove that the plaintiff had not been readmitted after that time, and there was evidence that in 1824 the plaintiff had acted as an attorney, and had been retained by the defendant

^b 18 Eng. Com. Law Reps. 250. ^c 3 Id. 243. ^d 12 Id. 50. ^e 2 Id. 447.

^f 14 Id. 166. ^g 8 Id. 225. ^h 14 Id. 176.

in that character, it was held, that this *prima facie* evidence was un rebutted by the defendant, and that the plaintiff was entitled to recover. *Pearce v. Whale*, 5 B. and C. 38.¹ It is no defence in an action for fees due for the suing out a commission of bankruptcy, that the plaintiff is only an attorney of K. B. and not a solicitor in Chancery. *Wilkinson v. Diggell*, 1 B. and C. 158.* And it is no defence that the plaintiff refused to go on with a suit in Chancery, if the defendant did not supply him with money. *Rawson v. Earle*, 1 M. and M. MSS.

Where one attorney does business for another, the attorney who does the business universally gives credit to the attorney who employs him, and not to the client for whose benefit it is done. If the attorney in such case intends not to be personally responsible, it becomes his duty to give express notice, that the business is to be done on the credit of the client. It furnishes no defence that the business was known by the plaintiff to be done for the benefit of the client. *Scrace v. Whittington*, 2 B. and C. 11.¹

ASSUMPSIT ON APOTHECARY'S OR SURGEON'S BILL.

The plaintiff must, in the first instance, prove his title to sue as an apothecary, for by stat. 55 Geo. III. c. 194, s. 21 (explained and amended by 6 Geo. IV. c. 133), no apothecary shall be allowed to recover any charges claimed by him in any court of law, unless such apothecary shall prove on the trial, that he was in practice as an apothecary prior to or on the 1st August, 1815, (*see Apothecaries' Comp. v. Roby*, 5 B. and A. 952: and it seems, that by 6 Geo. IV. c. 133, s. 5, he must prove himself to have been in practice on the first day of August, 1815,) or that he has obtained a certificate to practice as such from the Apothecaries' Company. The statute does not relate to physicians, chemists, or druggists, or to the College of Surgeons. Sec. 28, 29. It has been ruled by Best, C. J., that an apothecary may either charge for his attendances, or for the medicines which he supplies, but that he cannot charge for both. *Towne v. Lady Gresley*, 3 C. and P. 581; ^a but see *Handey v. Hen-son*, 4 C. and P. 110,^a post, p. 202.

"Practice as an apothecary."] Merely administering medicines previous to the 1st August, 1815, will not be sufficient to prove that the party practised as an apothecary, and incapacity to make up the prescriptions of a physician will be cogent evidence to prove the negative. *Apothecaries' Company v. Warburton*, 3 B. and A. 40.* It has been ruled by Lord Tenterden, that curing a local complaint is not sufficient evidence that the party compounded medicines according to prescription. To entitle him to sue he

¹ 11 Eng. Com. Law Reps. 138. ² 8 Id. 50. ³ 9 Id. 7. ^a 14 Id. 462.

^b 19 Id. 300. ^c 5 Id. 223.

must have practised the general duties of an apothecary. *Thompson v. Lewis*, 1 *M. and M.* 255, 3 *C. and P.* 483,^p *S. C.* Practice while in the service of another is not a practising within the act. *Brown v. Robinson*, 1 *C. and P.* 264.^a

Certificate.] By 6 Geo. IV. c. 133, s. 7, the common seal of the Company of Apothecaries is sufficient proof of the certificate, and that the person therein named is qualified to practise: but the seal must be proved to be the seal of the company. *Chadwick v. Bunning, R. and M.* 306, 2 *C. and P.* 106,^r *S. C.* A general certificate, not confining the party to practise in the country, will entitle him to recover for business done in London, although he has only paid 4*l.* 4*s.* the price of the country certificate under 55 Geo. III. c. 194, s. 19. *Ibid.* The certificate supersedes the necessity of proving an apprenticeship served. *Sherwin v. Smith*, 1 *Bing.* 204,^s 8 *B. Moore*, 30. *S. C.*

If a promissory note be given "in consideration of the plaintiff's care, and medical attendance bestowed upon the maker," and notice is given of disputing the consideration of the note, it is incumbent upon the plaintiff to prove himself qualified by stat. 55 Geo. III. c. 194. *Blogg v. Pinkers, R. and M.* 125.

Surgeon's Bill.

By 3 Hen. VIII. c. 11, s. 1, no one shall act as a surgeon within the city of London, or seven miles round, unless he be examined and licensed by the College of Surgeons, under the penalty of 5*l.* per month. It is incumbent upon the defendant, if he intends to avail himself of the plaintiff being unlicensed, to prove that fact, *Gremaire v. Le Clerc Bois Valon*, 2 *Campb.* 143, and it seems that as the statute contains no prohibitory clause, a person, though subject to a penalty, may recover for his labour. *Ibid.*

A surgeon who practices as a physician, having no diploma, cannot maintain an action for his fees; *Lipscombe v. Holmes*, 2 *Campb.* 441; and if in his bill a surgeon leaves a blank for his charge for attendances, and the defendant pays a certain sum into court on that account, the plaintiff is bound by that sum, and cannot recover more. *Tuson v. Batting*, 3 *Esp.* 192.

A surgeon not having a certificate from the Apothecaries' Company, cannot charge for his attendance or for administering medicine, except in cases within his own department. He cannot, therefore, recover for attending a patient in the typhus fever. *Alison v. Haydon*, 4 *Bingh.* 619,^t 3 *C. and P.* 246,^u *S. C.* But if the plaintiff be a surgeon and apothecary he may, besides his charges for medicine, recover reasonable charges for attendances. *Handey v. Henson*, 4 *C. and P.* 110.^v

^p 14 *Eng. Com. Law Reps.* 401. ^q 11 *Id.* 386. ^r 12 *Id.* 49.
^s 8 *Id.* 297. ^t 15 *Id.* 90. ^u 14 *Id.* 289. ^v 19 *Id.* 300.

Defence.

If the defendant has received no benefit, in consequence of the plaintiff's want of skill, the latter cannot recover. *Kannen v. M^r Mullen, Peake, N. P. C. 59. Duffit v. James cited 7 East, 480.* So a person who professes to cure disorders in a specified time by sovereign remedies, and induces the defendant to employ him by false and fraudulent representations of his skill, and does not succeed in his cure, cannot recover for medicines and attendance, *Huys v. Phelps, 2 Stark. 480;* but the remuneration of a regular practitioner, who has used due care and diligence, does not depend on his effecting a cure. *Per Abbott, C. J., ibid.*

A physician can maintain no action for his fees. *Chorly v. Bolcot, 4 T. R. 317.*

ASSUMPSIT FOR SERVANTS' WAGES.

In an action by a servant for his wages, the plaintiff must prove a retainer, of which his service will be evidence, the length of time he has served, and the amount of his wages.

A general hiring, without mention of time, is a hiring for a year, and if during the year the master dismiss his servant without cause, the latter is entitled to his wages until the end of the year. *Beeston v. Collyer, 4 Bingh. 309,* 2 C. and P. 607,† S. C.* But if he leaves his service during the year without cause, it seems to be a forfeiture of the wages due to him, and he cannot recover any thing. *Hutman v. Boulnois, 2 C. and P. 510.‡* With regard to a menial servant, there is a common understanding that the contract may be dissolved by either party,—by the master on paying a month's wages or giving a month's warning, by the servant on giving a month's warning. *See Beeston v. Collyer, 4 Bingh. 313.‡* In such case, therefore, if the master, without reasonable cause, turn the servant away, the latter will only be entitled to recover a month's wages. *Robinson v. Hindman, 3 Esp. 235.* But other servants, as clerks, &c. may recover their wages for the remainder of the year. *Beeston v. Collyer, 4 Bingh. 309.‡* And where wages are payable quarterly, and the servant is tortiously discharged in the middle of the quarter, he has been allowed to recover for the whole quarter, on the general count for work and labour. *Gandall v. Pontigny, 4 Campb. 375, 1 Stark. 198,§ S. C. See Eardly v. Price, 2 N. R. 333; but see Hulle v. Heightman, 2 East, 145.* But if a servant misconduct himself, the master may turn him away without any warning; *Spain v. Arnott, 2 Stark. 256;¶ Trotman v. Dunn, 4 Campb. 212;* and in such case, the misbehaviour seems to be a forfeiture of the accruing wages. *Alkin v. Acton, 4 C. and P. 208.¶ See Shirman v. Bennett, 1 M. and M. MSS.* A servant incapacitated from

* 3 Eng. Com. Law Reps. 440. † 13 Id. 444. ‡ 12 Id. 286. § 12 Id. 239.

¶ 2 Id. 354. • 3 Id. 339. • 19 Id. 346.

actual service during part of his time by sickness, is still entitled to recover his wages for the whole period. *R. v. Winterdatt, Cald.* 298; and see *Chandler v. Grieves*, 2 H. B. 606.

A servant who has come over from the West Indies, where he has been a slave, and who continues in the service of his master in England, is not entitled to wages without an express agreement. *Alfred v. Fitzjames*, 3 Esp. 3.

ASSUMPSIT FOR NOT ACCEPTING GOODS.

In an action of assumpsit for not accepting goods sold, the plaintiff must prove the contract and breach, the performance of all conditions precedent on his part, and the amount of damage.

The contract.] By the seventeenth section of the statute of frauds, 29 Car. II. c. 3, no contract for the sale of any goods, wares, and merchandises, for the price of 10*l.* sterling, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties, to be charged by such contract, or their agents thereunto lawfully authorised.

What contracts are within the seventeenth section of the statute of frauds.] It was formerly thought that executory contracts were not within the statute; *Towers v. Sir J. Osborne*, 1 Str. 505, *Clayton v. Andrews*, 4 Burr. 2101, B. N. P. 279; but that opinion was afterwards exploded; *Roudeau v. Wyatt*, 2 H. Bl. 63. *Garbutt v. Watson*, 5 B. and A. 613;⁴ and therefore it was held that a contract by the plaintiffs, who were millers, for the sale of flour, which was not at the time prepared so as to be capable of immediate delivery, was within the statute. *Garbutt v. Watson*, 5 B. and A. 613.⁴ But where the contract was not for the sale of goods, but for work and labour and materials found, as in that case the subject matter of the contract did not exist *in rerum naturâ*, and was incapable of delivery and of part acceptance, it was held not to be within the statute. Thus a contract for the purchase of a quantity of oak pins (for upwards of 10*l.*) which were not then made, but were to be cut out of slabs, was held not to be within the statute; *Groves v. Buck*, 3 M. and S. 178; and upon this principle the case of *Towers v. Osborne*, which was a contract for a chariot not then made, may be supported. *Cooper v. Elston*, 7 T. R. 17; see also *Astey v. Emery*, 4 M. and S. 262; *Smith v. Surman*, 9 B. and C. 576.* But now by Lord Tenterden's act, 9 Geo. IV. c. 14, s. 7, the above provision of the statute of frauds "shall extend to all

⁴ 7 Eng. Com. Law Reps. 209. • 17 Id. 443.

contracts for the sale of goods of the value of 10*l.* sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery. To bring the contract within the statute, the value of the goods must be upwards of 10*l.*, and where several articles were bought at a shop at the same time, but at different prices, each under 10*l.*, but amounting altogether to 70*l.*, it has been held to be one contract and within the statute. *Baldey v. Parker*, 2 B. and C. 37;¹ more fully stated post. With regard to contracts for the sale of growing crops and timber, see the cases cited ante, p. 120.

The cases with regard to an acceptance of goods within this section of the statute of frauds, are stated under a subsequent head. *Vide post*, "*Assumpsit for goods sold and delivered*," p. 216.

Sales by auction, of goods, are within the statute. *Kenworthy v. Schofield*, 2 B. and C. 945.²

What note or memorandum in writing is sufficient within the seventeenth section of the statute of frauds.] The word bargain, used in the statute, means the terms upon which the parties contract. *Per Bayley, J., Kenworthy v. Schofield*, 2 B. and C. 947.³ The price must be stated. *Elmore v. Kingscote*, 5 B. and C. 583.⁴ "We agree to give Mr. E. 1*s.* 7*d.* per pound for thirty bales of Smyrna cotton, customary allowance, cash three per cent., as soon as our certificate is complete,—M. and T." has been held a sufficient memorandum. *Egerton v. Mathews*, 6 East, 307. See *Cooper v. Smith*, 15 East, 103. *Richards v. Porter*, 6 B. and C. 437.⁵ As the language of this section is in substance the same as that of the fourth section, relating to the sale of lands, see 2 B. and C. 947,⁶ it will only be necessary to refer to the cases already cited, ante, p. 136, with regard to the signing of the note or memorandum by the party, and the manner in which two writings may be connected, in order to form a complete note or memorandum.

An auctioneer is the agent of both parties, *Kenworthy v. Schofield*, 2 B. and C. 947;⁷ and if he writes down the buyer's name, or that of his agent, in the catalogue, to which the conditions of sale are annexed, opposite the lot, together with the price bid, it seems a sufficient memorandum. *Phillimore v. Barry*, 1 Campb. 513. *Kenworthy v. Schofield*, 2 B. and C. 945. But where the conditions of sale are not annexed to the catalogue, and there is no reference to them in the catalogue, signing the buyer's name in the catalogue is not a compliance with the statute. *Hinde v. Whitehouse*, 7 East, 558. *Kenworthy v. Schofield*, 2 B. and C. 945.

¹ 9 Eng. Com. Law Reps. 16. ² 9 Id. 286. ³ 12 Id. 327. ⁴ 13 Id. 229.

If A., without authority, makes a contract in writing for the purchase of goods by B., and B. subsequently ratifies the contract, such ratification renders the act of A. valid, as an agent within the statute of frauds. *Maclean v. Dunn*, 4 Bingh. 722.²

A broker is the agent of both parties, and may bind them by signing the same contract on behalf of buyer and seller. Where bought and sold notes have been delivered by the broker to the parties, these notes, and not the entry by the broker in his book, are the proper evidence of the contract; *Thornton v. Meux*, 1 M. and M. 43; and such notes are admissible, though the entry in the broker's book has never been signed by him. *Goom v. Asfalo*, 6 B. and C. 117; ¹ 9 D. and R. 148, S. C. If the bought and sold notes materially differ, there will be no valid contract. *Grant v. Fletcher*, 5 B. and C. 436.³ *Thornton v. Meux*, 1 M. and M. 43. A bought note signed by the broker, and delivered to the purchaser, is not a sufficient note or memorandum within the statute. *Smith v. Sparrow*, 2 C. and P. 544;⁴ but see *Dickinson v. Lihval*, 1 Stark. 129.⁵ If no bought and sold notes have been made out, the entry in the broker's book, signed by him, will, as it seems, be evidence of the contract. *Grant v. Fletcher*, 5 B. and C. 436.⁶ *Henderson v. Barnewall*, 1 Y. and J. 387. Where the broker, in the bought and sold notes, described the seller's firm as A., B., and C.; but the firm had, in fact, unknown to the broker, been changed to A., D., and E., it was held that A., D., and E., might sue on the contract, it not appearing that the defendant had been prejudiced or excluded from a set-off, and there being some evidence of his having treated the contract as subsisting with the plaintiffs. *Michell v. Lapage*, Holt, 258.⁷ A material alteration in the sale note, by the broker, at the instance of the seller, after the bargain made, and without the consent of the purchaser, will preclude the seller from recovering. *Powell v. Divett*, 15 East, 29.

Performance of conditions precedent.] Where it is the duty of the plaintiff to tender the goods to the defendant, such tender must be averred and proved. So in an action for not accepting stock, the plaintiff must show that he has done every thing on his part towards the execution of the contract, by proving either a tender or refusal, or that he waited at the bank till the final close of the transfer books, on the day when the stock was to be transferred. *Bordenave v. Gregory*, 5 East, 107. But where, by the terms of the contract, it is incumbent on the purchaser to fetch away the goods, the averment and proof of a tender seem to be unnecessary, and it will be sufficient for the plaintiff to aver and prove a readiness to deliver. See *Rawson v. Johnson*, 1 East, 203. *Wilks v. Atkinson*, 1 Marsh. 412, post, p. 209.⁸

² 15 Eng. Com. Law Reps. 129. ¹ 13 Id. 116. ³ 11 Id. 265. ⁴ 12 Id. 253.
⁵ 2 Id. 325. ⁶ 3 Id. 91. ⁷ 1 Id. 292.

Damages.—In an action for not accepting goods to be paid for by a bill, the plaintiff is entitled to recover interest from the time the bill, if given, would have become due. *Boyce v. Warburton*, 2 *Campb.* 480. The difference between the contract price and the market price on the day the contract was broken is the measure of damages. *Boorman v. Nash*, 9 *B. and C.* 145.*

Goods bargained and sold.] If the plaintiff should fail on the special count, he may resort to the count for goods bargained and sold, and will be entitled to recover the whole value of the goods. *Hankey v. Smith, Peake*, 42 (n). Where goods in bulk are sold at so much per ton, an action for goods bargained and sold will not lie before they have been weighed. *Per Littledale, J., Simmons v. Swift*, 5 *B. and C.* 857.* In order to maintain a count for goods bargained and sold it must appear that the property passed, therefore where a machine is ordered to be made, the maker, having completed it, cannot sue for goods bargained and sold if there is no appropriation of the particular machine assented to by the buyer. *Atkinson v. Bell*, 8 *B. and C.* 277.* In one case the vendor was allowed to recover on a count for goods bargained and sold, although before action brought he had resold the goods, on the ground that the purchaser might maintain an action of trover for them. *Mertens v. Adcock*, 4 *Esp.* 251. But in another case it was ruled by Lord Kenyon, that the plaintiff having resold the goods, had, by that act, abandoned his right to insist upon the defendant taking his goods, and could not recover on a count for goods bargained and sold; *Hoare v. Milner, Peake*, 42 a (n); and in a late case, where, by the contract, the vendor had power to resell, the Court of Common Pleas doubted whether such an action could be maintained, after a resale; for by the resale the seller rescinds the contract and shows his dissent to the contract of bargain and sale. *Hagedorn v. Laing*, 6 *Taunt.* 166; see also *James v. Shore*, 1 *Stark.* 430,† *Greaves v. Ashlin*, 3 *Campb.* 426, *Langfort v. Tiler*, 1 *Salk.* 113. But it is now decided that an action for not accepting lies against a purchaser who refuses to take goods, although the vendor has resold them. *Maclean v. Dunn*, 4 *Bingh.* 722.*

Defence.

If the bulk of goods sold by sample does not accord with the sample, the defendant may insist on it as a defence, although it be proved that the common mode of settling disputes of this kind, is by making an allowance for the difference. *Hibbert v. Shee*, 1 *Campb.* 113. So he may show that the goods do not correspond with the kind mentioned in the contract. *Tye v. Tyamure*, 3 *Campb.* 462. But where, upon the sale of goods, the seller produces a sample, and

* 17 Eng. Com. Law Reps. 344. † 12 Id. 388. † 15 Id. 216. * 1 Id. 344.
* 2 Id. 456. * 15 Id. 129.

represents that the bulk is of equal quality, and there is a sale note which does not refer to the sample, it is no defence that the goods are not equal to the sample. *Meyer v. Ewerth*, 4 *Campb.* 22; See also *Pickering v. Dowson*, 4 *Taunt.* 779, *Kain v. Old*, 2 *B. and C.* 634.⁷ But under a contract to purchase 300 tons of Campeachy logwood, at 35% per ton, to be of real merchantable quality (such as might be determined to be otherwise by impartial judges, to be rejected), it was held that the vendee was bound to take so much of the wood tendered, as turned out to be of the sort described, at the contract price, though it appeared at the time that a part, which was afterwards ascertained to be 16 tons, was of a different and inferior description. *Graham v. Jackson*, 1 *East*, 498. Where a joint order is given for several articles, at several prices, the contract is entire, and the purchaser may refuse to accept one, unless the others are delivered. *Champion v. Short*, 1 *Campb.* 53. *Bal-dey v. Parker*, 2 *B. and C.* 47;⁸ and see *infra*. The purchaser by sample has a right to inspect the whole in bulk, at any proper and convenient time, and if the seller refuses to show it, may rescind the contract. *Lorymer v. Smith*, 1 *B. and C.* 1.⁹ See *Parker v. Palmer*, 4 *B. and A.* 387.¹⁰ If a man sells goods to be delivered on a future day, and neither has the goods at the time, nor has entered into any prior contract to buy them, nor has any reasonable expectation of receiving them by consignment, but means to go into the market and to buy the goods which he has contracted to deliver, he cannot maintain an action upon such a contract. *Per Abbot, C. J.*, *Bryan v. Lewis, R. and M.* 357.

ASSUMPSIT FOR NOT DELIVERING GOODS.

In assumpsit against the vendor of goods, for not delivering them, the plaintiff must prove the contract and the breach, *ante*, p. 204, the performance of all conditions precedent on his part, and the amount of damages.

Where A. by letter offered to sell to B. certain goods, *receiving an answer by course of post*, and the letter being misdirected by A. the answer notifying the acceptance of the offer arrived two days later than it ought to have done, and on the day following that when it should have arrived, had the first letter been rightly directed, A. sold the goods to a third person, it was held that there was a contract binding the parties from the moment the offer was accepted, and that B. was entitled to recover against A. in an action for the non-delivery. *Adams v. Lindsell*, 1 *B. and A.* 681. But in general, where an offer is made, the party who makes it may retract it at any time before acceptance by the other party. *Cooke v. Oxley*,

⁷ 9 Eng. Com. Law Repts. 205. ⁸ 9 Id. 16. ⁹ 8 Id. 1. ¹⁰ 6 Id. 455.

3 T. R. 653. *Roulledge v. Grant*, 4 Bingh. 653.* So the bidder at an auction may retract his bidding before the hammer is down. *Payne v. Cave*, 3 T. R. 148.

The terms of a contract were as follows:—"1st April. Sold W. P. one bale of sponge at, &c., and bought of him yellow ochre at, &c., the value to be delivered on or before the 24th inst. J. R." In an action by W. P. for not delivering the sponge, it was held that the delivery of the ochre on the 24th, was a condition precedent to the plaintiff's right of action. *Parker v. Rawlings*, 4 Bingh. 280.*

In support of the averment that the plaintiff was ready and willing to accept the goods, and to pay for the same, it will not be necessary to prove a tender of the money, it is sufficient to aver that the plaintiff was ready and willing to receive and pay for the goods, *Rawson v. Johnson*, 1 East, 203, *Waterhouse v. Skinner*, 2 B. and P. 447, and a demand of the goods seems to be sufficient evidence that the plaintiff was ready and willing. *Wilks v. Atkinson*, 1 Marsh. 412.* *Levy v. Lord Herbert*, 7 Taunt. 318.* And it is sufficient if the demand was by the plaintiff's servant. *Squier v. Hunt*, 3 Price, 68.

In case the goods are to be delivered at a future day, the damages are, the difference between the contract price and the price of the goods at or about the day when they ought to have been delivered. *Gainsford v. Carroll*, 2 B. and C. 624.* *Leigh v. Paterson*, 8 Taunt. 540.* But in an action for not replacing stock at a given day, the plaintiff is entitled to recover according to the price on the day of the trial. *Shepherd v. Johnson*, 2 East, 211.

ASSUMPSIT FOR GOODS SOLD AND DELIVERED.

The plaintiff in an action for goods sold and delivered must prove, 1. The contract of sale; 2. The delivery of the goods; 3. The value where there is no price agreed upon. In general, proof of the delivery of the goods to, and receipt of them by the defendant, is *prima facie* evidence of the contract, and supersedes the proof of an order. *Bennet v. Henderson*, 2 Stark. 550.*

The contract of sale.] In some cases, where goods have been wrongfully taken, the plaintiff may waive the tort, and sue on the implied contract. Thus where the defendant by fraud procured the plaintiff to sell goods to an insolvent, and afterwards got them into his own possession, he was held liable in an action for goods sold. *Hill v. Perrot*, 3 Taunt. 274, *recog. Abbotts v. Barry*, 2 B. and B. 369;* but see B. N. P. 130. *Bennet v. Francis*, 2 B. and P. 554. So where a father fraudulently represented that he was about to relinquish his business in favour of his son, to

* 15 Eng. Com. Law Reps. 99. * 13 Id. 483. * 1 Id. 292. * 2 Id. 119.

* 9 Id. 204. * 4 Id. 204. * 3 Id. 470. * 6 Id. 157.

whom (being a minor) goods were, upon such representation, supplied, which the father took into his own hands, he was held liable for goods sold and delivered. *Biddle v. Levy*, 1 Stark. 20; ¹ see also *Bennett v. Francis*, 4 Esp. 30, 2 B. and P. 550, S. C. *Read v. Hutchinson*, 3 Campb. 352. But where the plaintiff sold to the defendant beer in casks, giving him notice that unless he returned the casks in a fortnight he would be considered the purchaser, and the defendant omitted to return them, Lord Ellenborough held that the defendant was not liable on a count for goods sold and delivered. *Lyons v. Barnes*, 2 Stark. 30; ² but see *Studdy v. Sanders*, 5 B. and C. 628.³ Where the owner of property which has been taken away by another waives the tort, and elects to bring an action of assumpsit for the value, it is incumbent on him to show a clear and indisputable title to that property. *Per Abbott, C. J., Lee v. Shore*, 1 B. and C. 97.⁴

The value of fixtures cannot be recovered under a count for goods sold and delivered; *Lee v. Risdon*, 7 Taunt. 188.⁵ 2 Marsh. 495, S. C.; nor the value of standing trees; *Knowles v. Michel*, 13 East, 249: see *Smith v. Surman*, 9 B. and C. 561;⁶ but the value of trees which the defendant has purchased, and felled, and carried away, may be recovered under a count for trees sold and delivered. *Bragg v. Cole*, 6 B. Moore, 114.⁷ The value of growing crops may be recovered in a count for crops bargained and sold; *Parker v. Staniland*, 11 East, 362; and crops agreed to be taken by an incoming from an outgoing tenant, may be recovered under a count for goods bargained and sold. *Per Holroyd, J., Mayfield v. Wadsley*, 3 B. and C. 364.⁸ See also *Poulter v. Killingbeck*, 1 B. and P. 397. Where a person builds a house for another, he is not entitled to recover the value of the materials under a count for goods sold and delivered. *Cottrell v. Apsey*, 6 Taunt. 322.⁹

Where the contract was, that certain goods should be paid for partly in money and partly in buttons, Buller, J., held that the plaintiff could not recover under a count for goods sold, but should have declared specially. *Harris v. Fawle*, cited 1 H. B. 287. See also *Talon v. West*, Holt, 179;¹⁰ but see *Hands v. Burton*, 9 East, 349, *supra*. However, where A. agreed to give a horse in exchange for a horse of B. and a sum of money, and the horses were exchanged, but B. refused to pay the money, it was held that it might be recovered under the *indebitatus* count for horses sold and delivered, *Sheldon v. Cox*, 3 B. and C. 420.¹¹ So in an action to recover the value of a gun, for which the defendant was to give another gun and fifteen guineas, Lord Ellenborough was of opinion, that upon the refusal of the purchaser to pay for the gun in that mode, a contract resulted to pay for it in money, and that the value might be recovered under a count for goods bargained and sold.

¹ 2 Eng. Com. Law Reps. 277. ² 3 Id. 234. ³ 12 Id. 336. ⁴ 8 Id. 30.

⁵ 2 Id. 69. ⁶ 17 Id. 443. ⁷ 17 Id. 19. ⁸ 10 Id. 110. ⁹ 1 Id. 400. ¹⁰ 3 Id. 66.

¹¹ 10 Id. 137.

Forsyth v. Jervis, 1 Stark. 347*. See also *Ingram v. Shirley*, 1 Stark. 185.*

Proof of delivery.] A party cannot maintain an action for the price of goods sold and delivered, until he has either delivered them, or done something equivalent to delivery, as, for instance, if he has put it in the vendee's power to take away the goods himself. *Per Holroyd, J., Smith v. Chance*, 2 B. and A. 755; but see *Thompson v. Maceroni*, 3 B. and C. 1.* And where A. agreed to sell to B. certain goods, and earnest was paid, and the goods were packed in cloths furnished by B., and deposited in a building belonging to A., till B. should send for them, A. declaring at the same time that they should not be carried away till he was paid, it was held that this was not such a delivery as to entitle A. to maintain an action for goods sold and delivered. *Goodall v. Skelton*, 2 H. B. 316. See *Simmons v. Swift*, 5 B. and C. 857.* Where there is an entire contract to deliver a large quantity of goods, consisting of distinct parcels, within a specified time, and the seller delivers part, he cannot before the expiration of that time bring an action to recover the price of the part delivered, because the purchaser may, if the vendor fail to complete his contract, return the part delivered. But if he retain the part delivered after the seller has failed in performing his contract, the latter may recover the value of the goods which he has so delivered. *Oxendale v. Wetherell*, 9 B. and C. 386.* *Shipton v. Casson*, 5 B. and C. 383.* See *Walker v. Dixon*, 2 Stark. 281.* Where goods delivered on sale or return are not returned within a reasonable time, the value may be recovered in an action for goods sold and delivered. *Bailey v. Goldsmith, Peake*, 56.

To whom delivered.] Proof of a delivery to a third person, at the defendant's request, will support a count for goods sold and delivered to the defendant. *Per Cur. Bull v. Sibbs*, 8 T. R. 328. A delivery to a carrier, by whom goods are usually sent by the plaintiff to the defendant, is a delivery to the defendant; *Hart v. Sattley*, 3 Campb. 528; and it is now held, that if a tradesman order goods to be sent by a carrier, though he does not name any particular carrier, the moment the goods are delivered to the carrier, it operates as a delivery to the purchaser. *Per Cur. Dutton v. Solomonson*, 3 B. and P. 584; *Groning v. Mendham*, 5 M. and S. 189; but see *Anderson v. Hodgson*, 5 Price, 630. See 2 Saund. 47 k. (n). But in these and similar cases, a further question may arise, whether or not there has been a sufficient acceptance of the goods within the statute of frauds, so as to make the contract valid, when there is no note or memorandum in writing, as to which: *vide infra*.

* 2 Eng. Com. Law Reps. 461. * 2 Id. 348. * 10 Id. 3. * 12 Id. 388.

* 17 Id. 401. * 11 Id. 254. * 3 Id. 346.

Delivery to partner.] A question frequently arises in actions for goods sold and delivered, whether all the defendants are jointly liable as partners. Although the defendant cannot plead the non-joinder of a dormant partner in abatement (vide post, *Assumpsit, Defence*), yet the dormant partner may, at the option of the plaintiff, be joined as defendant in the action. *Lloyd v. Archbowl*, 2 Taunt. 327; and vide the cases cited, *infra*. Though a partnership is constituted by deed, it may, as already stated, *ante*, p. 1, be proved by parol evidence. An examined copy of an answer in Chancery by two of the defendants, to a bill of a third defendant, charging them as partners, and praying for an account, is good evidence to prove the partnership, as against the person so answering, *Studdy v. Sanders*, 2 D. and R. 347.⁴

Proof that the defendants suffered their names to be used as partners will be sufficient. If it can be proved that the defendant has held himself out to be a partner, not "to the world," for that is a loose expression, but to the plaintiff himself, or under such circumstances of publicity as to satisfy a jury that the plaintiff knew of it, and believed him to be a partner, he is liable to the plaintiff in all transactions in which he engaged and gave credit to the defendant upon the faith of being such partner. *Per Parke, J., Dickenson v. Valpy*, 10 B. and C. 140. Though, in point of fact, parties are not partners in trade, yet if one so represents himself, and by that means gets credit for goods for the other, both are liable. *Per Lord Kenyon, De Berkow v. Smith*, 1 Esp. 29; see *Kell v. Nainby*, 10 B. and C. 21. And if the name of a clerk be used in a firm, with his own consent, he is liable to third persons as a partner, though he receives no part of the profits. *Guidon v. Robson*, 2 Campb. 302. Persons may be partners in a particular concern or business, yet if they do not appear to the world as general partners, it will not be sufficient to constitute a general partnership, and make them liable in other cases not connected with such particular business. *De Berkow v. Smith*, 1 Esp. 29. And where there is a stipulation between A. B. and C. who appear to the world as co-partners, that C. shall not participate in the profit and loss, and shall not be liable as a partner, he is not liable as such to those persons who have notice of this stipulation. *Alderson v. Pope*, 1 Campb. 404 (n). The plaintiff must show that the name of the party was used in the firm with his own consent. See *Newsome v. Coles*, 2 Campb. 617; and see 2 H. Bl. 235 (n), 4th ed. Thus where a person allows his name to remain in a firm, either exposed to the public over a shop-door, or to be used in printed invoices or bills of parcels, or to be published in advertisements, the knowledge of the party that his name is used, and his assent thereto, is the very

⁴ 16 Eng. Com. Law Reps. 93.

ground upon which he is estopped from disputing his liability as a partner. *Per Tindal, C. J., Fox v. Clifton*, 6 Bingham 794.*

The liability of a person as partner may also be proved by showing that he participated in the profits of the concern, and it is immaterial whether he receives the profits for his own use, or as a trustee for others. Thus the executors of a deceased partner carrying on trade for the benefit of the estate are liable personally as co-partners. *Wightman v. Townroe*, 1 M. and S. 412. And if a firm, consisting of several, carry on business in the name of the partners, the whole firm will be bound by acts done by him as representing the firm. *South Carolina Bank v. Case*, 8 B. and C. 427; *Vere v. Ashby*, 10 B. and C. 293. However small the portion of profits received, it renders the party liable to all the engagements of the partnership. *R. v. Dodd*, 9 East, 527. And it is immaterial whether or not the party dealing with the concern knew at the time of such dealing, that the party whom he charges as a partner participated in the profits. *Ex parte Geller*, 1 Rose, 297; see *Lloyd v. Ashby*, 10 B. and C. 288.

The participation to render the party liable must be in the profits as such. Therefore a remuneration made to a traveller, or other clerk or agent, by a portion of the sums received by or for his master or principal, in lieu of a fixed salary, is only a mode of payment adopted to increase or secure exertion, and does not render the party a partner. *Per Abbott, C. J., Cheap v. Cramond*, 4 B. and Ald. 670.* So a person employed to sell goods, and who was to have for himself whatever money he could procure for them above a stated sum, was held not to be a co-partner. *Benjamin v. Porteous*, 2 H. Bl. 590; and see *Cheap v. Cramond*, 4 B. and A. 670.* So if there be an agreement between A., the sole owner of a lighter, and B., that the latter shall work the lighter, and in consideration of the working shall have half the gross earnings, this is only a mode of paying wages and not a partnership. *Dry v. Boswell*, 1 Campbell 329. So an agreement that a sailor shall receive a certain share of the produce of the voyage in lieu of wages does not make him a partner with the owners of the cargo. *Wilkinson v. Frazier*, 4 Esp. 182, *Mair v. Glennie*, 4 M. and S. 244, *R. v. Hartley*, Russ. and Ry. C. C. R. 139. But an agreement between two persons, that one of them should make purchases of goods for the other, and in lieu of brokerage should have one third of the profits arising from the sales, and should bear a certain proportion of the losses, makes the latter liable as a partner as to third persons. *Per Holroyd, J., Smith v. Watson*, 2 B. and C. 409.* A distinction has been taken between receiving a share of the profits, which renders the party liable as a partner, and relying on the profits as a fund for payment, which will not have that effect. *Grace v. Smith*, 2 W. Bl. 998. *Ex parte*

Hamper, 17 *Ves.* 404. *Ex parte Rowlandson*, 19 *Ves.* 461, 2 *H. Bl.* 236 (n), 4th ed.

Where a dormant partner quits the partnership without any public notice, he will not be liable to persons subsequently dealing with the partnership, and who were ignorant that he had ever been a partner. *Carter v. Whalley*, 1 *Barn. and Adol.* 11.

Delivery to wife.] Where the husband and wife live together, and goods are delivered to the wife by her order, a jury may presume the husband's assent. *Bac. Ab. Baron and Feme, H.* And where a husband is living in the same house with his wife, he is liable to any extent for goods which he permits her to receive there. If they are not cohabiting, then he is in general only liable for such necessities as from his situation in life it is his duty to supply to her. *Per Ld. Ellenborough, Waithman v. Wakefield*, 1 *Campb.* 121. And it is the duty of the party seeking to charge the husband to make out by proof that he is liable. *Per Lord Tenterden, Clifford v. Laton*, 1 *M. and M.* 102, 3 *S. and P.* 15,¹ *S. C. vide infra.* Where a wife carried on business on her own account during the imprisonment of her husband, and after his return articles were furnished in the same business with his knowledge, it was held that he was liable for these articles, though the invoices and receipts were made out in the wife's name. *Petty v. Anderson*, 3 *Bingh.* 170.* The presumption of the husband's liability may be rebutted by proof that the credit was given to her; *Bentley v. Griffin*, 5 *Taunt.* 356,¹ *Metcalfe v. Shaw*, 3 *Campb.* 22; see *Petty v. Anderson*, 3 *Bing.* 170;* or by proof of any other circumstances negating the husband's assent; see *Montague v. Benedict*, 3 *B. and C.* 531;² as where the wife has a sufficient allowance from her husband during his absence, of which the plaintiff has notice. *Holt v. Brien*, 4 *B. and A.* 252.³ If the husband and wife have parted by consent, the former remains liable for necessities supplied to the latter, unless he makes her an adequate allowance; *Hodgkinson v. Fletcher*, 4 *Campb.* 70, *Hindley v. Marquis of Westmeath*, 6 *B. and C.* 211;⁴ and unless the plaintiff has notice of the separate maintenance. *Rawlins v. Vandyke*, 3 *Esp.* 250. It is sufficient notice, if the fact was notorious in the place where the parties live. *Todd v. Stokes*, 1 *Ld. Raym.* 444. And where the husband and wife had lived separate for many years, and the wife had resources of her own adequate to her situation, of which the plaintiff had notice, it was held that he could not sue the husband. *Lidlow v. Wilmot*, 2 *Stark.* 88.⁵ See *Thomson v. Harvey*, 4 *Burr.* 2177, *Clifford v. Laton*, 1 *M. and M.* 101.⁶ A husband is liable for necessities provided for his wife, pending a suit in the ecclesiastical court, and before alimony,

¹ 14 Eng. Com. Law Reps. 188 ² 11 Id. 84. ³ 1 Id. 131. ⁴ 10 Id. 205.

⁵ 6 Id. 418. ⁶ 13 Id. 141. ⁷ 3 Id. 258.

decreed, although a decree, afterwards made, direct the alimony to be paid from a date before the time when the necessities were provided. *Keegan v. Smith*, 5 B. and C. 375.^a And after a divorce for adultery in the husband, and a decree of alimony, the husband is liable for necessities supplied to the wife, if he omit to pay the alimony. *Hunt v. De Blacquiere*, 5 Bingh. 550.^r After a divorce *ab initio*, the liability of the husband for the debts of his wife does not continue. *Anstey v. Manners*, Gow, 10.^a It seems that an express promise made by the husband to pay a debt contracted by a wife after a separation and adequate allowance, will be binding upon him. *Hornbuckle v. Hanbury*, 2 Stark. 177;^a see 4 B. and A. 254.^a

Where the wife elopes from her husband, and lives in adultery, the husband is not liable for necessities supplied to her. *Morris v. Martin*, 1 Str. 647. And where the husband turns the wife out of doors, on account of her having committed adultery under his roof, he is not liable for necessities furnished to her after her expulsion. *Ham v. Toovey*, Selw. N. P. 260. So if she elopes, though not with an adulterer; *Child v. Hardyman*, 2 Str. 875; but if, after an adulterous elopement, he takes her back, he is liable for necessities subsequently supplied. *Harris v. Morris*, 4 Esp. 41.

Where a wife leaves her husband under a reasonable apprehension of personal violence, he is liable for necessities subsequently furnished to her. *Houleston v. Smyth*, 3 Bingh. 127.^r So if he causelessly turns away his wife, or shuts his door against her; *Langworthy v. Hackmore*, cited 1 Ld. Raym. 444, *Rawlyns v. Vandyke*, 3 Esp. 251; and a notice that he will not be answerable for her debts will not relieve him from his liability. *Boulton v. Prentice*, Selw. N. P. 263. *Harris v. Morris*, 4 Esp. 42. It lies upon the plaintiff to show, that under the circumstances of the separation, or from the conduct of the husband, the wife had authority to bind him. *Mainwaring v. Leslie*, 1 M. and M. 18, 2 C. and P. 507,^v S. C. see ante, p. 214.

The plaintiff must prove, either that the defendant and the woman to whom the goods were delivered are married, which is sufficient *prima facie* evidence of the defendant's liability, *Car v. King*, 12 Mod. 372, or that she and the defendant cohabited, and that she passed as his wife, with his assent, and it will be no defence that the plaintiff knew her not to be his wife. *Watson v. Threlkeld*, 2 Esp. 637. *Robinson v. Nahon*, 1 Campb. 245. But this only applies where the woman assumes the defendant's name, lives in his house, and is part of his family. *Ibid.* And where the defendant has separated from a woman with whom he has lived as his wife, he is not liable for necessities subsequently supplied. *Munro v. De Chemant*, 4 Campb. 215.

^a 11 Eng. Com. Law Reps. 253. ^r 15 Id. 535. ^a 5 Id. 441.

^v 3 Id. 302. ^a 6 Id. 419. ^r 11 Id. 64. ^v 12 Id. 238.

Delivery to agent.] Where goods are delivered to an agent, the seller may in general sue the principal. The following has been laid down as the rule on this subject by Lord Tenterden: "If a person sells goods, supposing at the time of the contract that he is dealing with a principal, but afterwards discovers that the person with whom he has been dealing is not the principal in the transaction, but agent for a third person, though he may in the meantime have debited the agent with it, he may afterwards recover the amount from the real principal; subject however to this qualification, that the state of the account between the principal and the agent is not altered to the prejudice of the principal. On the other hand, if at the time of the sale the seller knows not only that the person who is nominally dealing with him is not principal but agent, and also knows who the principal really is, and notwithstanding all that knowledge chooses to make the agent his debtor, then, according to the cases of *Addison v. Gandasequi*, (4 Taunt. 574,) and *Patterson v. Gandasequi*, (15 East, 62), the seller cannot afterwards, on the failure of the agent, turn round and charge the principal, having once made his election at the time when he had the power of choosing between the one and the other." *Thomson v. Davenport*, 9 B. and C. 86.* The mere knowledge at the time of the contract that there is a principal, his name not being disclosed, will not prevent the seller who has debited the agent from afterwards resorting to the principal. *Ibid.*

Delivery to servant.] A master is not responsible for goods ordered by his servant, in his name, but without his authority, unless he has been in the habit of paying for goods so ordered. *Maunder v. Conyers*, 2 Stark. 281.† *Pearce v. Rogers*, 3 Esp. 214. If in one instance the master has employed the servant to buy on credit, he will be liable for any goods which the servant subsequently buys on credit, *Hazard v. Treadwell*, 1 Str. 506, *Rusby v. Scarlett*, 5 Esp. 76, and see *Gilman v. Robinson*, R. and M. 227, though he has given the servant money to pay for the goods in the latter instances. *Weyland's case*, 3 Salk. 234, 1 Ld. Raym. 225. *Rusby v. Scarlett*, 5 Esp. 76. When the master gives his servant money to pay for commodities as he buys them, and the servant embezzles the money, the master is not liable. *Stubbing v. Heintz, Peake*, 47.

Acceptance within the statute of frauds.] Where goods above the value of 10*l.* have been sold, and there is no note or memorandum in writing, and no earnest has been given, it frequently becomes a question whether or not there has been a sufficient acceptance of the goods, or part of them, within the statute of frauds, 29 Car. II. c. 3, s. 17. See the *sec. ante*, p. 204. In order to satisfy the statute, there must be a delivery of the goods by the vendor with an intention of vesting the right of possession in the vendee,

* 17 Eng. Com. Law Reps. 335. † 3 Id. 347.

and there must be an actual acceptance by the latter with the intention of taking to the possession as owner, *per Cur. Phillips v. Bistolli*, 2 B. and C. 513;* and there is not a sufficient acceptance, so long as the buyer continues to have a right to object, either to the quantum or quality of the goods. *Per Cur. Hanson v. Armitage*, 5 B. and A. 559.^a Thus where the defendant bought of the plaintiff's agent twelve bushels of tares (part of a larger quantity in bulk), and the agent measured the twelve bushels and set them apart for the vendee to remain till called for, it was held that there was no acceptance. *Howe v. Palmer*, 3 B. and A. 321.^b So where A. agreed to purchase a horse from B. for ready money, and to take him within a time agreed upon, and about the expiration of that time, A. rode the horse and gave directions as to its treatment, &c., but requested that it might remain in B.'s possession for a further time, at the expiration of which he promised to fetch it away and pay the price; these circumstances were held to constitute no acceptance; *Tempest v. Fitzgerald*, 3 B. and A. 680;^c and when a horse was sold, and no time fixed for payment, and the horse was to remain with the vendors for twenty days without any charge to the vendee, at the expiration of which time the horse was sent to grass by the direction of the vendee, and by his desire entered as the horse of one of the vendors, it was held that there was no acceptance. *Carter v. Touissant*, 5 B. and A. 855.^d So a delivery of goods to a wharfinger who has been accustomed to forward goods from the plaintiff to the defendant, which goods are lost while in the possession of the carrier, is not an acceptance within the statute. *Hanson v. Armitage*, 5 B. and A. 557.^e So when the purchaser appointed the mode in which the goods should be conveyed, and directed a third person in whose possession the goods were, to see them delivered and measured, and put up properly, these circumstances were held not to amount to an acceptance. *Astey v. Emery*, 4 M. and S. 262. The same principle was recognised in the following case: A. went to the shop of B. and Co., and contracted for the purchase of various articles, each of which was under the value of 10*l.*; but the whole amounted to 70*l.* A separate price for each article was agreed upon. Some A. marked with a pencil, others were measured in his presence, and others he assisted to cut from larger bulks. He then desired that an account of the whole might be sent to his house, and went away; a bill of parcels was accordingly sent, together with the goods, which A. refused to accept. It was held that this was all one contract, and therefore within the statute of frauds, and that there was no acceptance of the goods to take the case out of that statute. *Bal-dey v. Parker*, 2 B. and C. 37.^f So where a hogshead of wine in the warehouse of the London Dock Company was sold for 18*l.*, and a delivery order given to the vendee, but there was no assent on the

* 9 Eng. Com. Law Reps. 162. ^a 7 Id. 191. ^b 5 Id. 303. ^c 5 Id. 419.

^d 7 Id. 280. ^e 9 Id. 16.

part of the Dock Company to hold the wines as the agent of the vendee, it was held that there was no actual acceptance within the statute of frauds. *Bartall v. Burn*, 3 B. and C. 423;^f and see *Phillips v. Bistolli*, 2 B. and C. 511.^g Where goods of the value of 144*l.* were made to order, and remained in the possession of the vendor at the request of the vendee, with the exception of a small part which the latter took away, it was held that there was no actual acceptance of these goods by the buyer, within the 17th sec. of the statute of frauds, and that the plaintiff was not entitled to recover on the count for goods sold and delivered; *Thompson v. Maceroni*, 3 B. and C.,^h *sed quære*, for the statute only requires an acceptance of part. The traveller of A. and Co. in London, having called upon B. in the country for orders, B. gave an absolute order for a quantity of cream of tartar, and offered to take a quantity of lac dye, at a certain price; the traveller said the price was too low, but he would write to his principals, and if B. did not hear from them in one or two days, he might consider that his offer was accepted. A. and Co. never wrote to B., but sent all the goods; it was held that this was not a joint order for all the goods, so as to make the acceptance of the cream of tartar, the acceptance of the lac dye also, within 29 Car. II. c. 3, s. 17. *Price v. Lea*, 1 B. and C. 156.ⁱ

The circumstances in the following cases were held to constitute an acceptance within the statute. The defendant bought a quantity of hay from the plaintiff, and sold it to another person, by whom it was taken away, and it was held that the jury might presume an acceptance by the defendant. *Chaplin v. Rogers*, 1 East, 193. The defendant bought two horses from the plaintiff, a livery-stable keeper, and desired him to keep them at livery for him; it was held that the plaintiff, by assenting to this order, and changing the stables in which the horses had been kept, from his livery-stables, had relinquished his lien, and that there was a constructive delivery of them to the defendant. *Elmore v. Stone*, 1 Taunt. 458; see 3 B. and A. 324,^k 5 B. and A. 858,^l 9 B. and C. 570.^m Where A. bargained for a horse then in a stable, and soon afterwards brought in a third person, and stated to him that he had bought the horse, and offered to sell it to him for a profit of 5*l.*, it was held that it ought to be left to the jury to say, whether this was, or was not, a delivery (acceptance.) *Blenkinsop v. Clayton*, 7 Taunt. 597;ⁿ and see *Phillips v. Bistolli*, 2 B. and C. 511.^g Where the purchaser of goods at the time of sale wrote his own name upon a particular article, Lord Ellenborough ruled, that if his purpose was to denote that he had purchased it, and to appropriate it to his own use, it was a sufficient acceptance within the statute. *Hodgson v. Le Bret*, 1 Campb. 233. *Anderson v. Scott*, *Id.* 235 (n); but see *Baldey v. Parker*, 2 B.

^f 10 Eng. Com. Law Reps. 138. ^g 9 *Id.* 162. ^h 10 *Id.* 3. ⁱ 8 *Id.* 48.

^k 5 *Id.* 304. ^l 7 *Id.* 281. ^m 17 *Id.* 445. ⁿ 2 *Id.* 230.

and C. 37,* *ante*, p. 217. *Proctor v. Jones*, 2 C. and P. 532.* Where the goods are ponderous and incapable of being handed over from one to another, there need not be an actual delivery, but it may be done by what is tantamount, such as the delivery of a key of the warehouse in which the goods are lodged, or by delivery of other indicia of property. *Per* *Ld. Kenyon, Chaplin v. Rogers*, 1 East, 194. *Elmore v. Stone*, 1 Taunt. 460. A written order given by the seller of goods to the buyer, directing the person in whose care the goods are to deliver them to the buyer, is sufficient within the statute, *Searle v. Keeves*, 2 Esp. 598, if the person accept the order for delivery, and assent to hold the goods as an agent of the buyer. *Bartall v. Burn*, 3 B. and C. 426,* *supra*. Where A. agreed to sell to B. 20 hogsheads of sugar then in bulk, and filled up and delivered four, and afterwards filled up the remaining 16, and gave notice to the defendant, who said he would take them away as soon as he could, this was held equivalent to an actual acceptance of the 16 hogsheads. *Rhode v. Thwaites*, 6 B. and C. 388.* The delivery of a sample, if considered to be part of the thing sold, is a sufficient acceptance, but otherwise, where it is a sample merely, and forms no part of the bulk. *Talver v. West, Holt*, 178.* *Cooper v. Elston*, 7 T. R. 14. *Hinde v. Whitehouse*, 7 East, 558. If the purchaser draws the edge of a shilling across the hand of the vendor, and returns the money into his own pocket, which in the north of England is called "striking off a bargain," this is no earnest, or part payment within the statute. *Blenkinsop v. Clayton*, 7 Taunt. 597.*

Value.] Where the goods have been sold without any agreement as to the price, their value must be proved. For the cases in which the defendant is entitled to reduce the plaintiff's claim, on account of the inferiority of the goods, *vide next page*. Where the vendor of goods is only able to prove the delivery of a package, without any evidence of the contents, it will be presumed that it was filled with the cheapest commodity in which he deals. *Clunnes v. Pezzey*, 1 Campb. 8. If a seller agree to sell a machine at a certain price, and put in materials superior to those contracted for, the purchaser is neither bound to pay a higher price, nor to return the machine. *Wilnot v. Smith*, 3 C. and P. 415.*

Defence.

Evidence in reduction of damages.] It frequently becomes a question in this action whether the defendant can give the bad quality of the article in evidence, in reduction of the value claimed by the plaintiff. It seems that such evidence is admissible in the following cases.

1. Where the plaintiff claims only on a *quantum meruit*, and no

* 9 Eng. Com. Law Reps. 16. * 12 Id. 248. * 10 Id. 138. * 13 Id. 206.

* 3 Id. 66. * 2 Id. 230. * 14 Id. 336.

price has been agreed upon. *Basten v. Butter*, 7 East, 479. *Farnsworth v. Garrard*, 1 Campb. 38.

2. Where there is a stipulated price, but the defendant, immediately on discovering that the goods do not correspond with the contract, or after giving them a reasonable trial, gives notice to the plaintiff to take them back. If such notice is not given, and the defendant keeps the goods, he is liable to pay the stipulated price. *Grimaldi v. White*, 4 Esp. 95. *Fisher v. Samuda*, 1 Campb. 190. *Okell v. Smith*, 1 Stark. 107.* *Groning v. Mendham*, Id. 257;† and see *Basten v. Butter*, 7 East, 584. *Percival v. Blake*, 2 C. and P. 518.‡

3. Where there is a stipulated price, and a warranty as to the quality, in this case the vendee may retain the goods, and set up their inferiority in reduction of damages, although he has not offered to return them, or given any notice to the vendor. *Cormack v. Gillis*, cited 7 East, 480. *Fielder v. Starkin*, 1 H. Bl. 17. *Germaine v. Burton*, 3 Stark. 32.‡ *Poulton v. Lattimore*, 9 B. and C. 259.‡ But if the vendee proceed to use the goods, though warranted, without any notice to the vendor of their inferiority, and so deprive him of the means of ascertaining their real value, the vendor may recover his whole demand. *Hopkins v. Appleby*, 1 Stark. 477.‡ Still, if from the nature of the article it must be used, in order to ascertain whether the warranty has been complied with (as in the case of seeds), the purchaser may insist upon the warranty, without having given any notice. *Poulton v. Lattimore*, 9 B. and C. 259.‡

Where a bill of exchange has been given for the amount of goods sold, the defendant cannot afterwards question the reasonableness of the demand. *Knox v. Whalley*, 1 Esp. 159.

[*Action brought before credit expired.*] If the action is brought before the credit has expired, the plaintiff will be nonsuited. And even where goods are fraudulently bought on credit, the seller cannot sue for goods sold and delivered, before the credit has expired, though he might have maintained trover. *Ferguson v. Carrington*, 9 B. and C. 59,‡ 3 C. and P. 457,‡ S. C. What is sufficient proof of the time of the commencement of the action has been already stated, *ante*, p. 199. Where a person purchases goods, and agrees to pay for them in three months, by a bill at two months, which bill he afterwards refuses to give, an action for goods sold and delivered will not lie till the expiration of the five months. *Mussen v. Price*, 4 East, 146. *Lee v. Risdon*, 2 Marsh. 495.‡ But where goods were sold at three months' credit, the vendor agreeing to take the vendee's bill at three months' date, at the end of the first three months, if he wished for further time, and the vendee at the end of the three months did not give such bill, Lord Ellenborough held that the vendor might bring an action for goods sold and delivered immediately. *Nickson v. Jepson*,

* 2 Eng. Com. Law Reps. 316. † 2 Id. 380. ‡ 12 Id. 241. § 14 Id. 152.

¶ 17 Id. 373. • 2 Id. 475. † 17 Id. 330. • 14 Id. 387. ‡ 2 Id. 69.

2 Stark. 227.* And where a bill is given for goods, and dishonoured, the vendor may sue for the price of the goods immediately, 7 Taunt. 312; *Hickling v. Harday*, 1 B. Moore, 61, S. C. *Mussen v. Price*, 4 East, 151; provided the bills are in the hands of the seller; but if they are in the hands of third persons, that is a defence to the action, where the defendant may be called upon by those persons to pay the bills. *Kearslake v. Morgan*, 5 T. R. 513. *Burden v. Hallen*, 4 Bingh. 455.† If, by the contract, it was agreed that a bill at a certain date should be given, it operates as a giving of credit; and although no bill should be given, the seller cannot sue the purchaser for goods sold and delivered, before the period when the bill, if given, would have become due. *Mussen v. Price*, 4 East, 154, *supra*. Upon a sale of goods at six or nine months, the purchaser, by not paying at the end of six months, makes his election to take credit for the nine months. *Price v. Nixon*, 5 Taunt. 338.‡

As to the defence of illegality in this action, *vide post*, "*Assumpsit—defence.*"

ASSUMPSIT FOR WORK AND LABOUR.

In an action for work and labour, the plaintiff must prove, 1. The contract; 2. The performance of the work and labour at the defendant's request; and 3. The value.

The contract.] Although a special contract has been entered into, the plaintiff is permitted, in certain cases, to recover upon the general *indebitatus* count. Whenever the duty of the defendant arising upon the execution of the consideration is simply to pay money, the usual and safest mode of pleading is, to declare in *indebitatus assumpsit*, as in the case of goods sold, work and labour done, and other cases. *Per Park, J., Streeter v. Horlock*, 1 Bingh. 37.‡ And where there is a special agreement, the terms of which have been performed, it raises a duty for which an *indebitatus assumpsit* will lie. *B. N. P.* 139. *Robson v. Godfrey, Holt*, 237.‡ *Studdy v. Sanders*, 5 B. and C. 638.‡ So if there is a special agreement, and the work has been done, though not pursuant to such agreement, the plaintiff may recover upon the *quantum meruit*, for otherwise he would not be able to recover at all. *Ibid.* But the defendant may refuse to take to the subject matter of the plaintiff's work and labour, where there is a deviation from the special contract; and, in such case, the plaintiff cannot recover on the *quantum meruit*; see *Ellis v. Hamlen*, 3 Taunt. 52, 4 Taunt. 748; though it is otherwise where the defendant has acquiesced in and adopted the

* 3 Eng. Com. Law Reps. 327. † 2 Id. 118. ‡ 15 Id. 37. § 1 Id. 128.

¶ 8 Id. 233. ** 3 Id. 85. † 12 Id. 336.

deviations. *Burn v. Miller*, 4 Taunt. 745. Where there is a special contract, but additional work has been done, not included in the special contract, the value of the additional work may be recovered under the *indebitatus* count, although from the stipulations of the special contract as to credit, &c. the value of the work done under the special contract cannot be recovered. *Robson v. Godfrey, Holt*, 236,* 1 Stark. 275,* S. C. Where the special contract is so entirely abandoned that it is impossible to trace it, the workman shall be permitted to charge for the whole work done, by measure and value, as if no contract had ever been made; but if not wholly abandoned, the contract shall operate as far as it can be traced, and the excess only shall be paid for according to the usual rate of charging. *Pepper v. Burland, Peake*, 103. Where there is a written contract it must be produced, although the plaintiff seeks to recover for extras, and the defendant has admitted one of the items to be extra. *Vincent v. Cole*, 1 M. and M. 257. But where a man is employed to do work under a written contract, and a separate order for other work is afterwards given by parol during the continuance of the first employment, the written contract need not be produced by the plaintiff in an action for the second work. *Reid v. Batte*, 1 M. and M. 413.

Where the defendant had contributed to the funds of a building society, and had been present at a meeting of the society, and party to a resolution that certain houses should be built, it was held that this made him liable to an action for work done in building those houses, without proof of his having an interest in them or in the land. *Braithwaite v. Skofield*, 9 B. and C. 401.*

Where the defendant requested the plaintiff to take care of and show his (the defendant's) house, and promised to make him a handsome present, it was held that the plaintiff might recover a reasonable recompense for this work and labour; *Jewry v. Busk*, 5 Taunt. 302;† but where a person performed work for a committee, under a resolution entered into by them, "that any service rendered by him should be taken into consideration, and such remuneration be made as should be deemed right," it was held that an action would not lie to recover a recompense for such work. *Taylor v. Brewer*, 1 M. and S. 290. There is no implied assumpsit to pay an arbitrator for his trouble. *Verany v. Warne*, 4 Esp. 47; but see 1 Gow, 8,‡ *Per Dallas, C. J. contra.*

A master may maintain assumpsit for the work and labour of his apprentice, against a person who harbours him after his desertion, for he may waive the tort, and sue on the implied contract. *Foster v. Stewart*, 3 M. and S. 191.‡

Under the general count for work and labour, the plaintiff may give evidence of a particular species of work and labour as a farrier,

* 3 Eng. Com. Law Reps. 85. † 2 Id. 388. ‡ 17 Id. 404. § 1 Id. 113.
 ¶ 5 Id. 440.

and the medicines administered by him may be considered as *materials* within the count; *Clarke v. Memford*, 3 *Campb.* 37; and see *Meeke v. Ozlade*, 1 *N. R.* 289; but where the claim "for materials found," &c. was omitted in the count for work and labour, it was held that the plaintiff, who sought to recover for building a house and furnishing the timber, could not recover for the latter under the count for goods sold and delivered. *Cotterell v. Apsey*, 6 *Taunt.* 322.*

An action for work and labour will not lie by a person who manufactures a chattel out of his own materials. The rule is thus laid down by Mr. Justice Bayley: if you employ a man to build a house on your land or to make a chattel with your materials, the party who does the work has no power to appropriate the produce of his labour and your materials to any other person. Having bestowed his labour at your request on your materials, he may maintain an action against you for work and labour. But if you employ another to work up his own materials in making a chattel, then he may appropriate the produce of that labour and materials to any other person. No right to maintain any action vests in him during the progress of the work; but when the chattel has assumed the character bargained for, and the employer accepted it, the party employed may maintain an action for goods sold and delivered; or if the employer refuses it, a special action on the case for such refusal, but he cannot maintain an action for work and labour, because the labour was bestowed on his own materials, and for himself, and not for the person who employed him." *Atkinson v. Bell*, 8 *B. and C.* 283.*

Contract.—Repairs of ships.] Registered ownership (that is, proof of the register, and that such register has been made with the assent of the parties therein named) is *prima facie* evidence of the liability of those parties for the repairs of the ship; *Cox v. Reid*, *R. and M.* 199; but such evidence may be rebutted by proof of the beneficial interest having been parted with, and of the legal owner having ceased to interfere with the management of the ship. *Jennings v. Griffiths*, *R. and M.* 42. *Young v. Brander*, 8 *East*, 10. The true question in matters of this description is, "Upon whose credit was the work done?" *Per Abbot, C. J.*, *Jennings v. Griffiths*, *R. and M.* 43. So a person who takes a share in a ship, under a void conveyance, is not liable for articles furnished to the ship, unless credit be given to him individually, or he holds himself out as owner. *Harrington v. Fry*, 2 *Bingh.* 179.† An undertaking by the defendant's attorney "to appear for Messrs. T. and M. joint owners of the sloop A." is evidence against the defendants of the joint ownership. *Marshall v. Cliff*, 4 *Campb.* 133. Whether a mortgagee of a ship, before possession, was liable to repairs, was

* 1 *Eng. Com. Law Reps.* 400. † 16 *Id.* 216. † 9 *Id.* 370.

formerly much doubted; see *Briggs v. Wilkinson*, 7 B. and C. 30; but now, by recent acts of parliament, when a transfer is made only as a security for the payment of debts, by way of mortgage, or of assignment to trustees by way of sale, on a statement being made in the book of registry, and in the indorsement on the certificate of registry to that effect, the person to whom the transfer is made, or any other claiming under him, is not to be deemed the owner, nor is the person making such transfer to be deemed to have ceased to be an owner, except so far as may be necessary for the purpose of rendering the ship transferred available by sale or otherwise, for the payment of those debts, to secure the payment of which the transfer was made. 4 Geo. IV. c. 41, s. 43, 6 Geo. IV. c. 110, s. 45. *Abbott on shipping*, 17, 5th ed.

Performance at the defendant's request.] The plaintiff must prove a performance of the work and labour, according to the terms of the contract, or if there is a deviation from those terms, an acquiescence by the defendant in the deviation, *vide supra*. Thus in an action to recover the value of a riding-habit, for which the defendant's wife had been measured, but which was returned to the plaintiff on the day on which it was delivered, it was ruled to be incumbent on the plaintiff to prove that the habit was made agreeably to the order. *Hayden v. Hayward*, 1 Campb. 180. So a herald who sues for making out a pedigree, is bound to give some general evidence of the truth of the pedigree. *Townsend v. Neal*, 2 Campb. 191.

In general, the contract will be evidence that the work has been performed at the defendant's request, or the request may be inferred from the defendant's acquiescence in the work which is carrying on upon his premises, or from his voluntarily availing himself of the benefit of the plaintiff's services. 3 Stark. Ev. 1763. Where A., who was employed by the defendant to transport goods to a foreign market, delegated the entire employment to the plaintiff, who performed it without the privity of the defendant, it was held that the plaintiff could not recover from the defendant a compensation for such service. *Schmaling v. Tomlinson*, 6 Taunt. 147.

Value.] In what manner the value of the work is to be calculated where there is a special contract and deviations from it, has been already mentioned, *ante*, p. 221.

In an action for work and labour as a surveyor, Lord Kenyon held that the plaintiff was only entitled to a reasonable compensation, not to be estimated by the amount laid out by the defendant in the building, which is the custom with surveyors. *Upsdell v. Stewart, Peake*, 193. But in a subsequent case, Lord Ellenborough left it to the jury to say whether the usual commission of five per cent. was a vicious or unreasonable mode of charging, and the jury

found for the plaintiff for the whole demand. *Chapman v. De Taste*, 2 Stark. 294; * see also *Malby v. Christie*, 1 Esp. 340.

Defence.

Where the work has not been executed according to the contract, the party for whom it is executed may repudiate it, and in such case the plaintiff cannot recover. *Ellis v. Hamlen*, 3 Taunt. 52, ante, p. 221. So if the defendant has received no benefit, from the work having been improperly executed by the plaintiff, the latter cannot recover. *Farnsworth v. Garrard*, 1 Campb. 83. *Duncan v. Blundell*, 3 Stark. 6.² *Montrou v. Jefferies, R. and M.* 317, ante, p. 200. Thus an auctioneer, through whose gross negligence the sale becomes nugatory, can recover nothing for his services. *Denew v. Daverell*, 3 Campb. 451. But where the defendant has derived some benefit from the plaintiff's service, he must pay *pro tanto*; *Farnsworth v. Garrard*, 1 Campb. 38; and if he seeks to reduce the plaintiff's damages, on account of a non-compliance with the terms of the contract, he should, as it seems, give notice to the plaintiff that he considers the contract not complied with. See ante, p. 220. However, in a late case, where the plaintiff had contracted to repair some chandeliers for 10*l.*, and returned them incompletely repaired, in an action for work and labour it was held that as the plaintiff had not performed his part of the contract, he could not recover any thing, though the jury found that the repairs were worth 5*l.* *Sinclair v. Bowles*, 9 B. and C. 92.⁷

As to the defence of illegality in this action, *vide post*, "*Assumpsit—defence.*"

ASSUMPSIT FOR MONEY PAID.

The plaintiff, in an action of assumpsit for money paid, must prove, 1. The payment of money; 2. That it was paid at the request of the defendant.

The payment of money.] The plaintiff must prove that money was paid, the giving a security as a bond or warrant of attorney is not sufficient, *Taylor v. Higgins*, 3 East, 169, *Maxwell v. Jameson*, 2 B. and A. 51, unless, perhaps, where a bill or note is taken as payment. *Barclay v. Gooch*, 2 Esp. 571. So stock cannot be considered as money. *Jones v. Brindley*, 1 East, 1. The plaintiff must prove that the money paid was his money. Thus an under-tenant, whose goods have been distrained and sold by the original landlord, for rent due from his immediate tenant, cannot maintain an action for money paid the use of the latter; for immediately on the sale under the distress, the money paid by the purchaser vests in the

* 3 Eng. Com. Law Reps. 353. 2 14 Id. 145. 7 17 Id. 340.

landlord, in satisfaction of the rent, and never was the money of the under-tenant. *Moore v. Pyrke*, 11 *East*, 52.

The defendant's request.] The plaintiff must prove a request by the defendant, express or implied. Thus if the plaintiff has paid the money without the defendant's request, though to discharge a just debt, no action will lie, *Stokes v. Lewis*, 1 *T. R.* 20, as where a broker purchases stock, to fulfil a contract entered into by him for his principal, but which his principal refuses to make good. *Child v. Morley*, 8 *T. R.* 614. So where the party to whom the stock was contracted to be sold, on the defendant's refusal to transfer, bought the stock himself, and brought assumpsit for money paid, to recover the difference in the price of the stock, it was held that the action could not be sustained. *Lightfoot v. Creed*, 8 *Taunt.* 268.* A subsequent assent to the payment will be evidence of a previous request. 1 *Saund.* 264, (n), 5th ed.

A payment by the plaintiff, under a legal obligation, will also be evidence of a previous request, as where one person is surety for another, and is called on to pay, the money paid may be recovered, though the surety did not pay the debt by the desire of the principal. *Per Ld. Kenyon, Exall v. Partridge*, 8 *T. R.* 310. In such an action, the plaintiff must prove the contract of indemnity, and that it was entered into at the request of the defendant, and that he has paid the money guaranteed. So where several are sureties, and one is compelled to pay the whole, he may recover from each of his co-sureties a rateable proportion of the money so paid; *Cowell v. Edwards*, 2 *B. and P.* 268, *Deering v. Winchelsea*, *id.* 270; but there is no such contribution between wrong-doers. *Merryweather v. Nixan*, 8 *T. R.* 186. Where one bail sues his co-bail for contribution, he must prove the judgment, as well as the execution. *Beldon v. Tankard*, 1 *Marsh.* 6.† Where the goods of the plaintiff, in the house of the defendant, are seized for rent due from the defendant, the plaintiff may recover in this action the money which he has paid to redeem them. *Exall v. Partridge*, 8 *T. R.* 308. *Dawson v. Linton*, 5 *B. and A.* 521.‡ So an accommodation acceptor, who has defended an action on the bill, at the request of the drawer, may recover the costs of such action, as money. *Houes v. Martin*, 1 *Esp.* 162. So also the indorser of a bill who has been sued by the holder, and paid him part of the amount of the bill, may recover that amount in an action for money paid against the acceptor. *Pownall v. Ferrand*, 6 *B. and C.* 439.‡ But he cannot recover the costs of the former action. *Dawson v. Morgan*, 9 *B. and C.* 618.‡ A person who pays a bill for the honour of one of the parties to it may sue him for money paid. *Smith v. Nissen*, 1 *T. R.* 269. But he must prove that a formal protest was made before the payment. *Vandewall v. Tyrrell*, 1 *M. and M.* 88.

* 4 *Eng. Com. Law Reps.* 100. † 4 *Id.* 326. ‡ 7 *Id.* 179. § 13 *Id.* 239.

¶ 17 *Id.* 457.

Bail may recover, as money paid, the expenses incurred by them in taking their principal, but not the costs of an action against them, unadvisedly defended. *Fisher v. Fallows*, 1 *Esp.* 171. Money paid lies against a ship owner for money supplied to the captain, either in a foreign or English port, for necessary repairs, provided it be so applied, to prove which the captain is an admissible witness. *Rocher v. Busher*, 1 *Stark.* 27.* *Palmer v. Gooch*, 2 *Stark.* 428.¹ *Robinson v. Lyall*, 7 *Price*, 392. Where a carrier, by mistake, delivered to B. goods sold and consigned to C., and B. appropriated the goods, and the carrier, on demand, without action, paid C., the court of C. P. held that the carrier might recover from B. the sum so paid, as money paid to his use; *Brown v. Hodgson*, 4 *Taunt.* 189; but Lord Ellenborough, in a similar case, ruled that it was necessary to declare specially. *Sills v. Laing*, 4 *Campb.* 81. Where a party is compelled to pay money in consequence of his own neglect, *Capp v. Topham*, 6 *East*, 392, or breach of duty, *Pitcher v. Bailey*, 8 *East*, 171, the law raises no implied promise to repay him. If the money is paid in furtherance of an illegal transaction, it cannot be recovered. *Mitchell v. Cockburne*, 2 *H. Bl.* 380. *Aubert v. Maize*, 2 *B. and P.* 380; and see *Cannan v. Bryce*, 3 *B. and A.* 179,² and *post*, p. 232.

ASSUMPSIT FOR MONEY LENT.

In an action of assumpsit for money lent, the plaintiff will only have to prove the loan of his money. Of this a promissory note given by the defendant to the plaintiff will be evidence. *Story v. Atkins*, 2 *Str.* 719; and see *ante*, p. 175. To establish a loan, it is not sufficient merely to prove the payment of money to the defendant, for in such case the presumption of law is that the money is paid in liquidation of an antecedent debt; *Welsh v. Seaborne*, 1 *Stark.* 474;³ but if the plaintiff can show any money transactions between the defendant and himself, from which a loan may be inferred, or any application by the defendant to borrow money at the time, this, coupled with the passing of the money, will be evidence of a loan. *Carey v. Gerrish*, 4 *Esp.* 9. If a parent advances money to a child, it is supposed to be by way of gift. *Per Bayley, J., Hick v. Keats*, 4 *B. and C.* 71.⁴ Interest is not recoverable on money lent, unless there be a contract or usage to that effect; *Calton v. Bragg*, 15 *East*, 223; but if the course of dealing between the parties be such, interest upon interest may be recovered. *Newell v. Jones*, C. and P. 124.⁵ *vide infra*. A lender who has received goods as a security, may recover in an action for money lent, without proving that he has returned or tendered the goods. *Lawton v. Newland*, 2 *Stark.* 73.¹

* 2 Eng. Com. Law Reps. 280. ¹ 3 Id. 416. ² 5 Id. 225. ³ 2 Id. 473.

⁴ 10 Id. 277. ⁵ 19 Id. 304. ⁶ 3 Id. 251.

ASSUMPSIT FOR MONEY HAD AND RECEIVED.

In an action for money had and received, the plaintiff must prove the receipt of the money by the defendant, and his own title to recover it. This action cannot be maintained if it be against equity and good conscience that the money should be recovered. Thus where A. purchased an annuity for her life, which was regularly paid up to the time of her death, but no memorial of the grant of the annuity was enrolled, it was held that A.'s executrix could not on that ground insist that the contract was void, and recover back the consideration money paid for the annuity. *Davis v. Bryan*, 6 B. and C. 651.^m

Receipt of money.] The plaintiff must prove that money has been received, and therefore an action for money had and received will not lie to recover stock: *Nightingal v. Devisme*, 5 Burr. 2589: and it has been held that it will not lie against a finder of bank-notes, to recover their value; *Noyes v. Price*, H. 16 Geo. III. Select Ca. 242, *Chitty's Bills*, 426, 5th ed.; though, if not produced at the trial, the receipt of their value will be presumed, *Chitty, ubi sup.* citing *Longchamp v. Kenny*, Dougl. 138; see *Harrington v. Macmorris*, 5 Taunt. 228; ⁿ vide supra. The value of provincial notes received as money, may be recovered in this action. *Pickard v. Bankes*, 13 East, 20. *Fox v. Cutworth*, cited 4 Bingh. 179.^o The principle in all the cases is, that if a thing be received as money, it may be treated and recovered as such. *Per Best, C. J., Spratt v. Hobhouse*, 4 Bingh. 179.^o The plaintiff must give some evidence of a particular sum; and if he gives no evidence of the amount due he must be nonsuited. *Harvey v. Archbold*, 5 D. and R. 504;^p and see *Bernosconi v. Anderson*, 1 M. and M. 183, post, p. 236.

Receipt of money by the defendant.] The plaintiff must prove that the money has been received to his use by the defendant. The mere bearer of money from one person to another, cannot be sued. *Coles v. Wright*, 4 Taunt. 198. So an agent who has paid money over, pursuant to the directions of the party depositing it with him, and without notice of the plaintiff's title, cannot be sued; but merely passing it in account is not a payment, *Buller v. Harrison*, Cowp. 565, *Horsefall v. Handley*, 8 Taunt. 136,^r and until there has been a change of circumstances by his having paid over the money to his principal, or done something equivalent to it, he remains liable. *Cox v. Prentice*, 3 M. and S. 344. So if he pays it over, after notice that the right to it is disputed. *Edwards v. Hodding*, 5 Taunt. 815.^r Vide ante, p. 141. A receipt signed by an agent for his principals for "S. and W.," "W. R." is not evidence to support an action for money had and received against the agent.

^m18 Eng. Com. Law Reps. 291. ⁿ1 Id. 88. ^o13 Id. 395. ^p10 Id. 203.
^r4 Id. 46. ^s1 Id. 277.

Edden v. Read, 3 *Campb.* 339. Where money in litigation between two parties has by consent been paid over to a stakeholder in trust for the party entitled, it can only be recovered from the stakeholder, and not from the original debtor. *Ker v. Osborne*, 9 *East*, 378.

On failure of or without consideration.] Where money has been paid on a consideration which has wholly failed, it may be recovered in this action by the party who has paid it. Thus if an annuity be defective, and the deeds are set aside, the consideration money may be recovered. *Shore v. Webb*, 1 *T. R.* 732. So where one of several securities securing the annuity fails. *Scurfield v. Gouland*, 6 *East*, 241. In such an action the deeds should be produced and their execution proved, and the setting them aside proved by the production of the rule of court. 2 *Stark. Ev.* 215 (n). The receipt of the money must also be proved. The defendant in these cases may deduct the payments made by him in respect of the annuity. *Hicks v. Hicks*, 3 *East*, 12. See *Davis v. Bryan*, 6 *B. and C.* 651, *ante*, p. 228. Where a scheme for establishing a tontine was put forth, stating that the money subscribed was to be laid out at interest, and after some subscriptions had been paid by the directors, in whom the management of the concern was vested, but before any part of the money was laid out at interest, the directors resolved to abandon the project, it was held that each subscriber might, in an action for money had and received, recover the whole of the money advanced by him, without any deduction for expenses. *Nockells v. Crosby*, 3 *B. and C.* 814.¹ So the money paid for the purchase of shares may, under similar circumstances, be recovered. *Kempson v. Saunders*, 4 *Bingh.* 5.² Where a fixed sum has been paid to the parish by the putative father of a bastard, and the child dies, the residue of the sum unexpended may be recovered in this action. *Watkins v. Howlett*, 1 *B. and B.* 1.³

In cases of forgery.] Where a party paying money upon a forged instrument has not been guilty of any want of due caution, which in consequence of the character which he fills he is bound to exercise, and has not by his conduct affected the rights of any other parties to the instrument, he may in general recover back the money paid by him, as money paid under a mistake. A person who discounts a forged navy bill, may recover back the money, as money had and received to his use. *Jones v. Ryde*, 5 *Taunt.* 488,⁴ 1 *Marsh.* 157, *S. C.* So in the case of forged bank-notes. *Per Gibbs, C. J., ibid.* So where a banker by mistake paid a bill for the honour of a customer whose name was forged, but discovering the mistake gave notice thereof to the holder in time to enable him to give notice of non-payment to the indorsers, it was held that

¹ 13 Eng. Com. Law Reps. 290. ² 10 Id. 237. ³ 13 Id. 321. ⁴ 5 Id. 1.
⁵ 1 Id. 166.

the money was recoverable from the holder. *Wilkinson v. Johnson, B. and C. 428.*^{*} And so where the plaintiffs discounted for the defendants a bill of exchange, which the latter did not indorse, and the signatures of the drawer and acceptor (the latter of whom kept an account with the plaintiffs) were forged, it was ruled that the defendants were liable to refund the money. *Fuller v. Smith, R. and M. 49.*

But where the party paying the money has the means of knowing, or is bound to know, that the handwriting is forged, or where by his delay in discovering his mistake he has deprived the holder of the means of resorting to other parties on the bill, he will not be allowed to recover. Thus where two bills were drawn upon the plaintiff, one of which he accepted, and both of which he paid, and it appeared that the handwriting of the drawers was forged, it was held that it was incumbent upon the plaintiff to be satisfied that the bill drawn upon him was the drawer's hand, before he accepted or paid it, and that he could not recover the amount. *Price v. Neal, 3 Burr. 1354, 1 W. Bl. 390, S. C. see B. and C. 434.*^{*} So where a banker paid a bill which purported to be accepted payable at his house by one of his customers, and the forgery of the acceptor's name was not discovered until the end of a week, it was held that the money could not be recovered from the holder. *Smith v. Mercer, 6 Taunt. 76;*[†] *see 3 B. and C. 435.*^{*} Where a check drawn by a customer upon his banker for a sum of money described in the body of the check in words and figures, was afterwards altered by the holder, who substituted a larger sum for that mentioned in the check, but in such a manner that no person in the ordinary course of business could observe it, and the banker paid to the holder this larger sum, it was held that the banker could not charge his customer for any thing beyond the sum for which the check was originally drawn. *Hall v. Fuller, 5 B. and C. 750,*^{*} *8 D. and R. 464, S. C.*

Money paid under a mistake of facts or of law.] Money paid under a mistake of facts, and which the party receiving it has no claim in conscience to retain, is recoverable as money paid without consideration. *See the cases last cited, and Bize v. Dickason, 1 T. R. 285. Mines v. Duncan, 6 B. and C. 750.*^{*} But where money is paid with a knowledge of all the facts, but under a mistake of the law, it cannot in general be recovered; *Bilbie v. Lumley, 2 East, 469; Brisbane v. Dacres, 5 Taunt. 143;*[†] *Cartwright v. Rowley, 2 Esp. 723;* though it has been paid under a protest. *Brown v. McKinnally, 1 Esp. 279.* Where an article is sold, which turns out to be of less value than the price given for it, the extra price, if there be no fraud, cannot be recovered back; *Per Le Blanc, J., Cox v. Prentice, 3 M. and S. 349;* but where parties agree to abide

^{*} 10 Eng. Com. Law Reps. 140. [†] 1 Id. 312. ^{*} 12 Id. 368. ^{*} 13 Id. 293.

[†] 1 Id. 43.

by the weighing of any article at any particular scales, and in the weighing, an error, not perceived at the time, takes place from an accidental misreckoning of some weight, and the thing is reported of more weight than it really is, and the price is paid thereupon, money had and received is sustainable. *Per Lord Ellenborough, ibid.* A tenant who has paid rent to his landlord, and has afterwards been ejected by a third person, who sues him for the mesne profits, and recovers for the period during which the tenant has paid his rent, may recover the rent so paid from his landlord in an action for money had and received, the landlord not having set up any title at the trial of the ejectment. *Newsome v. Graham*, 10 B. and C. 234. See 1 *Freeman*, 479 (note d), 2d ed.

As to money had and received on rescinding a contract, see *ante*, p. 141, and p. 190.

Money obtained by fraud or duress, &c.] Where money has been obtained by fraud or duress, this action lies to recover it; and money fraudulently obtained, may be recovered at law, although the defendant may be entitled to it by the ecclesiastical law. *Crockford v. Winter*, 1 *Campb.* 124. So where the defendant married the plaintiff, living his former wife, and received the rents of her land, they were held recoverable in this form of action. *Hasser v. Wallis*, 1 *Salk.* 28. So where the defendant fraudulently colluded with J. S. who was insolvent, to obtain wines from the plaintiff, the proceeds of which eventually came to the defendant's hands, in satisfaction of a debt due to him from J. S., the plaintiff was held entitled to recover in this action. *Abbotts v. Barry*, 2 B. and B. 369,* 5 B. *Moore*, 98, S. C.

So where a man has been compelled by duress to pay money, it may be recovered in this action, as where he has paid an exorbitant sum to redeem his goods from pawn. *Astley v. Reynolds*, 2 *Str.* 915. Where goods not liable to seizure are seized by a revenue officer, who extorts money to release them; *Irving v. Wilson*, 4 *T. R.* 485; where a corporation officer extorts a fee for granting a license; *Morgan v. Palmer*, 2 B. and C. 729,* where a sheriff claims and receives a larger fee than he is entitled to; *Dew v. Parsons*, 2 B. and A. 568; where a toll-keeper exacts an illegal toll; *Parsons v. Blandy*, *Wightw.* 22; this action is maintainable. But where replevin would be the proper remedy, this action does not lie, as where money has been paid to release goods taken as a distress; *Lindon v. Hooper*, *Cowp.* 414; and where an action is brought, and the defendant pays the demand "without prejudice," he cannot afterwards recover the money so paid. *Brown v. McKinally*, 1 *Esp.* 279. So money recovered by legal process, though in fact not due, cannot be recovered by the defendant in the former action. *Marriott v. Hampton*, 7 *T. R.* 269; but this action lies to recover

* 6 Eng. Com. Law Reps. 157. * 9 *Id.* 232.

money in the hands of an overseer, levied on a conviction which has been quashed. *Feltham v. Terry*, cited 1 T. R. 387.

In cases of illegal contracts.] Where money has been paid, in pursuance of an illegal contract, it is in certain cases recoverable, as money had and received to the use of the party paying it. It may be recovered in the following cases; see 1 H. Bl. 65 (n), 4th ed. I. When the contract remains *executory* though the plaintiff and defendant be *in pari delicto*. *Tappendall v. Randall*, 2 B. and P. 467. *Aubert v. Walsh*, 3 Taunt. 277. *Busk v. Walsh*, 4 Taunt. 290, per Buller, J. *Lovry v. Bourdieu*, Dougl. 468. A distinction, however, has been taken between contracts merely illegal, and contracts to perform some act *malum in se*, or grossly immoral, in which case it is said, the courts will not interfere to compel the repayment of the money, even though the contract remains *executory*; but the distinction between *mala prohibita* and *mala in se* has been frequently denied. See *Farmer v. Russel*, 1 B. and P. 298. *Aubert v. Maze*, 2 B. and P. 371. *Cannan v. Bryce*, 3 B. and A. 179.* II. The money is recoverable from a stakeholder into whose hands it has been paid, upon an illegal consideration *executed* by the happening of the event upon which the wager is made; provided the money has not been paid over by the stakeholder to the other party, or provided the plaintiff has demanded it before it was paid over; or provided that the stakeholder has paid over the money without the authority of the plaintiff. *Cotton v. Thurland*, 5 T. R. 405; *Bate v. Cartwright*, 7 Price, 540; *Smith v. Buckmore*, 4 Taunt. 474; and see R. and M. 214 (n). *Hastelow v. Jackson*, 8 B. and C. 221.† III. The money is recoverable, though the contract be *executed*, provided the plaintiff be not *in pari delicto* with the defendant. *Jacques v. Withy*, 1 H. Bl. 65. *Williams v. Hedley*, 8 East, 378. IV. The agent of a party to an illegal contract, who receives money under it, to the use of his principal, cannot set up the illegality of the transaction in an action brought against him by his principal. *Tenant v. Elliott*, 1 B. and P. 3; *Farmer v. Russel*, id. 296; but see *McGregor v. Lowe*, R. and M. 37. The money is not recoverable where the contract is *executed*, and the plaintiff is *in pari delicto* with the defendant. *Andree v. Fletcher*, 3 T. R. 206. *Howson v. Hancock*, 8 T. R. 575. *Vandyk v. Hewett*, 1 East, 96. *Thistlewood v. Cracroft*, 1 M. and S. 500. *Stokes v. Twitchin*, 8 Taunt. 492.‡

On transfer of debt by arrangement between three parties.] Where A. was indebted to B. for brokerage, and B. was indebted to C. for money lent, and B. gave an order to A. to pay C. the sum due from A. to B. as a security, on which C. lent B. a further sum

* 5 Eng. Com. Law Reps. 255. † 15 Id. 204. ‡ 4 Id. 183.

and the order was accepted by A., it was held that on A.'s refusal to comply with the order, C. might maintain an action for money had and received against him. *Israel v. Douglas*, 1 H. Bl. 239; and see *Wilson v. Coupland*, 5 B. and A. 228.¹ It seems, however, that the agreement must be such, that the debt due from B. to C. is thereby extinguished; *Cuxon v. Chadley*, 3 B. and C. 591;² *Wharton v. Walker*, 4 B. and C. 165;³ and the debt transferred must also be a demand for money had and received. Thus where A. being indebted to B. gave him an order upon C., his (A.'s) tenant to pay the amount of the next rent that would become due, and B. sent the order to C., but had not any direct communication with him upon the subject, and at the next rent day C. produced the order to A., and promised to pay the amount to B., and upon receiving the difference between that and the whole rent, A. gave a receipt for the whole, it was held that B. could not recover the amount of the order from C., either in an action for money had and received, or upon an account stated. *Wharton v. Walker*, 4 B. and C. 163.⁴ Where there is a defined and ascertained debt due from A. to B., and a debt to the same or a larger amount due from C. to A., and the three agree that C. shall be B.'s debtor instead of A., and C. promises to pay B., in an action by the latter against C. it is incumbent on him to show, that at the time when C. promised to pay B. there was an ascertained debt due from A. to B. *Fairlie v. Downton*, 8 B. and C. 395.⁵

In case of partnership.] Where two persons agree to divide the profits of an agency between themselves, and one of them receives on account of such agency a certain sum of money, the other cannot maintain this action for a moiety, it being a partnership transaction, and there being no account settled. *Bovell v. Hammond*, 6 B. and C. 149.⁶ *Bayley dub.* See *Coffer v. Brian*, 3 Bingh. 54,⁷ 10 B. Moore, 341, S. C.

ASSUMPSIT FOR INTEREST.

The principle upon which interest is claimed is, that it is a matter of contract between the parties. "It is now established as a general principle that interest is allowed by law only upon mercantile securities; or in those cases where there has been an express promise to pay interest; or where such promise is to be implied from the usage of trade or other circumstances." *Per Abbott, C. J., Huggins v. Sargent*, 2 B. and C. 349.⁸

Many cases are to be found at variance with the rule as above stated, in which interest has been allowed, on the ground that the money was payable at a day certain, a ground now clearly unten-

¹ 7 Eng. Com. Law Reps. 77. ² 10 Id. 191. ³ 10 Id. 302. ⁴ 15 Id. 246.
⁵ 13 Id. 126. ⁶ 11 Id. 25. ⁷ 9 Id. 101.

able. See *Foster v. Weston*, 6 Bingh. 714.¹ Thus it has been held that interest is payable on a sum awarded to be paid on a certain day. *Pinhorn v. Tuckington*, 3 Campb. 468; and see *Swinford v. Burn, Gow*, 9.¹ So in *Chalie v. Duke of York*, 6 Esp. 46, which was an action for goods sold and delivered, Lord Ellenborough said, that the mere settling the balance did not entitle the party to interest from that time, nor was he so entitled unless a time was fixed for the payment of the money, from which time only interest could be claimed. See also *Blaney v. Henricks*, 2 Wils. 205.

A larger rule than that abovementioned was laid down by Best, C. J., in *Arnott v. Redfern*, 3 Bingh. 259.² "However a debt is contracted, if it has been wrongfully withheld by a defendant, after the plaintiff has endeavoured to obtain payment of it, the jury may give interest in the shape of damages for the unjust detention of the debt." Upon this opinion, Lord Tenterden has observed, that if adopted as a general rule, it might frequently be made a question at *Nisi Prius*, whether proper means had been used to obtain payment of the debt, and such as the party ought to have used, which would be productive of much inconvenience. *Page v. Newman*, 9 B. and C. 381.³

In case of mercantile instruments.] The mercantile instruments which carry interest are, Bills of Exchange and Promissory Notes. Where the bills or note specifies that interest shall be paid, it is payable from the date; without such words, from the time when the bill or note becomes due. *Kennerley v. Nash*, 1 Stark. 452.⁴ *Orr v. Churchill*, 1 H. Bl. 227. *Doman v. Dibdin, Ry. and Moo.* 381. Upon a bill or note payable on demand, interest is given from the time of the demand proved. *Blaney v. Hendricks*, 2 W. Bl. 761. But where by the terms of the note, the maker promised to pay legal interest on demand, Lord Ellenborough held that this must mean from the date of the note. *Hopper v. Richmond*, 1 Stark. 508.⁵ Against the drawer of a bill interest is only recoverable from the time of his receiving notice of dishonour. *Walker v. Barnes*, 5 Taunt. 240.⁶ 1 Marsh. 36, S. C. See *Bayley on bills*, 280. It is said by Bayley, J., that in action on a bill, as the interest is in the nature of damages, the jury may disallow it in case they are of opinion that the delay of payment has been occasioned by the default of the holder. *Cameron v. Smith*, 2 B. and A. 308.

In cases of implied promise.] A promise to pay interest may be implied from the acts of the parties. Thus where a balance has been settled upon an allowance of interest in a banker's book; that is an admission by the party of a contract to pay interest on the sums advanced to him by the banker. *Per Lord Ellenborough*,

¹ 19 Eng. Com. Law Reps. 211. ² 5 Id. 438. ³ 13 Id. 1. ⁴ 17 Id. 399.

⁵ 2 Id. 466. ⁶ 2 Id. 488. ⁷ 1 Id. 91.

Calton v. Bragg, 15 East, 228. So where the plaintiffs had acted as agents for the defendant, and had advanced monies, and at the close of each yearly account, which was delivered annually, had charged interest, and at each rest had added the interest of the preceding year to the principal, Lord Ellenborough held that the accounts, which had not been objected to for a number of years, afforded sufficient evidence of a promise to pay interest in this manner. *Bruce v. Hunter*, 3 Campb. 467. But where compound interest is charged, it must appear that the party knew that the practice was to make such rests. *Moore v. Voughton*, 1 Stark. 487; and see *Daves v. Pinner*, 2 Campb. 486 (n).

Where interest is not allowed.] It has been held that interest cannot be recovered on money received to the use of another, *De Havelland v. Bowerbank*, 1 Campb. 50; though the money was obtained by fraud; *Crockford v. Winter*, 1 Campb. 129; nor for money lent to be repaid either upon demand, or at a given time; *Calton v. Bragg*, 15 East, 224; *Higgins v. Sargent*, 2 B. and C. 351;* nor where the borrower by a written instrument promises to repay it at a certain time; *Page v. Newman*, 9 B. and C. 378;† nor on money paid; *Car v. Edwards*, 3 Stark. 182;‡ nor on money due for work and labour; *Trelawney v. Thomas*, 1 H. Bl. 303; nor on money due for goods sold and delivered to be paid for on a certain day; *Gordon v. Swan*, 12 East, 419; 2 Campb. 429 (n), S. C.; nor upon a policy of insurance; *Kingston v. McIntosh*, 1 Campb. 518; nor upon a policy of insurance of a life, where the money is payable six months after the proof of the death; *Higgins v. Sargent*, 2 B. and C. 348;§ nor on a single bond; *Hogan v. Page*, 1 B. and P. 337; nor on rent; *Per Tindal, C. J., Foster v. Weston*, 6 Bingh. 714;¶ nor on an instrument “to pay 1500*l.* to be delivered in goods by three payments of 500*l.* each, at three, five, and seven months.” *Foster v. Weston*, 6 Bingh. 709.¶

ASSUMPSIT ON ACCOUNT STATED.

To recover upon the count, on an account stated, the plaintiff must prove an absolute acknowledgment by the defendant of the plaintiff's claim; a qualified acknowledgment is not sufficient, as, “I would have paid you if you had not removed the grates.” *Evans v. Verity, R. and M.* 239. Where a party examined before commissioners of bankrupt, admitted that he had received a sum of money on account of the bankrupt, after an act of bankruptcy, but not that it was a subsisting debt, it was held that this would not support a count on an account stated with the assignees. *Tucker v. Barrow*, 7 B. and C. 623.¶ And unless the defendant has ad-

* 2 Eng. Com. Law Reps. 479. † 9 Id. 101. ‡ 17 Id. 399. § 14 Id. 167.
¶ 19 Id. 211. ¶ 14 Id. 103.

mitted the amount of the debt, it must be proved *aliunde*, or the plaintiff will only be entitled to a verdict for nominal damages; *Dixon v. Deveridge*, 2 C. and P. 109;° but in an action by the plaintiff as executrix, when the defendant on being applied to by her for the payment of interest, stated that he would bring her some on the following Sunday, it was held that though this was an admission that something was due, still as it did not appear what the nature of the debt was, nor whether it was due to the plaintiff as executrix, or in her own right, nor that it was one for which assumpsit would lie, the plaintiff was not entitled to recover even nominal damages. *Green v. Davies*, 4 B. and C. 235,⁴ *Bernasconi v. Anderson*, 1 M. and M. 183, *Teal v. Auty*, 2 B. and B. 101,⁵ 4 B. Moore, 452, S. C. It is sufficient to prove the account stated without giving evidence of the several items constituting the account, *Bartlett v. Emery*, 1 T. R. 42 (n), and proof of one item is sufficient to maintain the count. *Highmore v. Primrose*, 5 M. and S. 65. Where a partnership has been dissolved, and a balance struck between the partners, and there has been a promise to pay such balance, it may be recovered under this count: *Foster v. Allanson*, 2 T. R. 479; but such action will only lie on a final balance of the partnership accounts, and not during the continuance of the partnership; *Fromont v. Coupland*, 2 Bingham, 170;⁶ nor as it seems without an express promise to pay the balance. *Ibid.* but see *Rackstraw v. Imber*, Holt, 368,⁷ *Clark v. Glennie*, 3 Stark. 10.⁸ *Henley v. Super*, 2 M. and R. 166, 8 B. and C. 20,⁹ S. C.

The plaintiff may recover on an account stated by the defendant with his (the plaintiff's) wife, but not on an account stated by the wife of the defendant, *B. N. P.* 129, unless she be proved to be the defendant's agent in the transaction, *ante*, p. 31. Where there were accounts between A. and B., and C. became a partner with B., and dealings continued between B. and C. as partners, and A., who afterwards settled an account with B. and C., wherein was included the money due from A. to B. alone, Lord Kenyon held that the whole might be given in evidence on a count on an account stated, in an action by B. and C. *Moore v. Hill*, Peake Ev. 273, 4th ed.; and see *Gough v. Davies*, 4 Price, 214, *David v. Ellice*, 5 B. and C. 196.⁸ An account stated was formerly considered conclusive, but a greater latitude now prevails, in order to remedy the errors which may have crept into the account in surcharging the items. *Per Lord Mansfield*, *Trueman v. Hurst*, 1 T. R. 42. If the defendant accounts with the plaintiff in a particular character, he will be taken to have admitted that character. *Peacock v. Harris*, 10 East, 104. See *ante*, p. 27.

A promissory note not properly stamped cannot be given in evidence as an admission by the maker upon a count on an account stated. *Green v. Davies*, 4 B. and C. 235.⁴ Nor a note payable on a contingency. *Morgan v. Jones*, 1 Crom. and Jervis, 162.

° 12 Eng. Com. Law Reps. 49. ⁴ 10 Id. 319. ⁵ 6 Id. 32. ⁶ 9 Id. 366.
⁷ 3 Id. 132. ⁸ 14 Id. 147. ⁹ 10 Id. 147. ¹ 11 Id. 201.

Where accounts are submitted to an arbitrator, not by bond, his award may be given in evidence under the count, on an account stated. *Keen v. Batshore*, 1 *Esp.* 194. And where an incoming tenant agrees to take fixtures at a valuation to be made by two brokers, and such valuation is made and the tenant enters, the value of the fixtures may be recovered under a count on an account stated. *Salmon v. Watson*, 4 *B. Moore*, 73.¹

DEFENCE IN ASSUMPSIT.

Pleas in abatement.

Upon issue taken on a plea in abatement, the plaintiff must be prepared to prove the amount of his damages, otherwise, though the issue be found for him, he will only be entitled to nominal damages. *Weleker v. Le Pelletier*, 1 *Campb.* 481. It has been already stated which party has a right to begin, where issue is joined upon a plea in abatement. *Ante*, p. 133.

Plea of non-joinder of co-contractor.] Where the contract has been made with others as well as the defendant, evidence of that fact will support a plea in abatement for the non-joinder.

Where one of several joint contractors has become bankrupt, he must still be joined as defendant, or the other contractor may plead the non-joinder in abatement. *Bovill v. Wood*, 2 *M. and S.* 23. *Hawkins v. Ramsbottom*, 6 *Taunt.* 179.² If the defendant should plead his bankruptcy, the plaintiff may enter a *nolle prosequi* as to him.

Where one of several joint contractors is an infant, he ought not to be joined, and if the defendant pleads his non-joinder in abatement the plaintiff may reply the infancy of the co-contractor. *Burgess v. Merrill*, 4 *Taunt.* 468. But where instead of replying the infancy, the plaintiff replied that the contract was made by the defendant solely, the court of Common Pleas held that the plea was supported by evidence that the promise was made by the defendant and the infant jointly, on the ground that the contract was not void as to the infant, but voidable only. *Gibbs v. Merrill*, 3 *Taunt.* 307. But it has been said, that a contract by an infant for goods for the purposes of trade is void and not merely voidable. *Per Bayley, J., Thornton v. Illingworth*, 2 *B. and C.* 826,³ *post*, p. 246.

Where the parties sought to be joined are not general partners but joint contractors in the transaction in question only, evidence must be given to show that the plaintiff knew that he was dealing with all of them.

So where the parties are not merely joint contractors, but gene-

¹ 16 *Eng. Com. Law Reps.* 363. ² 1 *Id.* 349. ³ 9 *Id.* 256.

ral partners, though one partner has authority to bind the others in matters relating to the partnership, yet if the contract is made by the defendant alone, and the plaintiff is not aware that he is dealing with the partnership, the non-joinder cannot be pleaded in abatement. *Mullett v. Hook*, 1 *M. and M.* 88. *Doo v. Chippenden*, *Abbott on Shipping*, 96, 5th ed. *Baldney v. Ritchie*, 1 *Stark.* 338.* *sed vide Dubois v. Ludert*, 5 *Taunt.* 609.† In order, therefore, to support the plea in abatement in such case, it must be shown that the plaintiff knew that he was dealing with the partnership; proof that the transaction took place at the office of the partnership, that the defendant and his partners publicly held themselves forth as partners in such transactions, or that the plaintiff had previous dealings with the partnership, will be evidence in support of the plea. On the other hand, any acts on the part of the defendant from which it can be inferred that he treated the transactions as several and not joint, will be evidence for the plaintiff. Where, in answer to a plea of non-joinder, the plaintiff gave in evidence several letters to him from the defendant, in which he promised to pay the money in question, without making any mention of his partners, Lord Ellenborough held the letters conclusive evidence that the debt was due from the defendant individually. *Murray v. Somerville*, 3 *Campb.* 90 (n).

There are many cases in which a party entering into a contract in his own name on behalf of others may be sued, or those for whom he contracts may be sued. *Per Bayley, J., Hall v. Smith*, 1 *B. and C.* 407.‡ Thus where a promissory note began "I promise to pay," and was signed "For W. S., W. P. S., &c." "William Smith," and William Smith pleaded in abatement the non-joinder, on which issue was taken, it was held that the issue was rightly found for the plaintiff. *Ibid.* See *March v. Ward, Peake*, 130. *Clark v. Blackstock, Holt.* 474.†

With regard to the competency of witnesses it has been held, that where the plea states that the promises were made jointly with A. B., the plaintiff might call A. B., since if the plaintiff recovered he would be liable to contribution, and the record in the action pending would not be evidence for him in an action by the defendant for contribution. *Cossham v. Goldney*, 2 *Stark.* 414.* But he is not a competent witness for the defendant, since his evidence would go to discharge himself from contribution and from his share of the costs. *Hare v. Munn*, 1 *M. and M.* 241 (n). *Evans v. Yeatherd*, 2 *Bingh.* 133; and *ante*, p. 89. But the declarations of the party named in the plea, made before action brought, are admissible for the defendant. *Clay v. Langlow*, 1 *M. and M.* 45.

Plea of misnomer.] The usual form of the plea of misnomer is, that the party is named and called by the name of—(the correct

* 2 Eng. Com. Law Reps. 416.

† 1 Id. 207.

‡ 3 Id. 112.

§ 3 Id. 159.

• 3 Id. 409. • 9 Id. 345.

name) without this that he was or ever has been called by the name of—(the wrong name). 2 *Chitty's Pl.* 450, 3d ed. The usual replication to this plea is, that the party was and still is known as well by the name of—(the name by which he is sued) as by the name of—&c. *Id.* p. 616. Upon this issue the plaintiff need not prove the baptismal name, but it will be sufficient to show that the party is generally known by the name by which he sues or is sued. But if the plea is, that the party was baptized by a certain name, and the replication that he was not so baptized, evidence of his reputed name is not sufficient, and his baptism must be proved. *Weleker v. Le Pelletier*, 1 *Campb.* 479. If the plaintiff replies that the defendant is estopped by having put in bail in the wrong name, see *Chitty's Pl.* 616, 3d ed., he must prove the estoppel by an examined copy of the recognizance of bail enrolled. *Meredith v. Hodges*, 2 *Bos. and Pul. N. R.* 453.

Pleas in bar.

In assumpsit all the most usual matters of defence may be given in evidence under the general issue (see the several heads post,) but a tender, the statute of limitations, bankruptcy, a discharge under the insolvent act, and a set-off (except in actions by assignees of bankrupt, or where a notice of set-off is given), must be specially pleaded. *Vide post.* So matter of defence arising after action brought, cannot be given in evidence under the general issue, but must be specially pleaded. *Le Brett v. Papillon*, 4 *East*, 502. *Lee v. Levy, B. and C.* 390.*

Accord and Satisfaction.

Accord and satisfaction may be given in evidence under the general issue, *Paramour v. Johnson*, 12 *Mod.* 377; and accord and satisfaction by one defendant is a bar for all. *Com. Dig. Accord* (A. 1). The defendant must prove the accord executed; therefore, where there is an agreement to pay money in satisfaction, it is not good to show that he has always been ready to pay it, or a tender or refusal. *Id.* (B. 4.) *Peytoe's case*, 9 *Rep.* 79, b; but see *Bradley v. Gregory*, 2 *Campb.* 385, post. So, though an accord to do a thing at a future day is good, yet it must be proved to be executed before action brought. 1 *Roll. Ab.* 129, l. 17.

It must appear to be a reasonable satisfaction, and therefore acceptance of a less sum cannot be a satisfaction in law of a greater sum than due, *Fitch v. Sutton*, 5 *East*, 230; but where a debtor entered into an agreement with his creditors (though not under seal) whereby they agreed to receive a certain sum per cent. in satisfaction of their demands, and released the remainder, in consideration that half the composition should be secured by the acceptances of a certain person (also a creditor), which security was

* 10 Eng. Com. Law Reps. 364.

given, and paid when due, it was held that this was a sufficient accord and satisfaction executed, and that a creditor who had received it could not afterwards sue the debtor, for to do so would be a fraud upon the security. *Steinman v. Magnus*, 11 *East*, 390. See *Lewis v. Jones*, 4 *B. and C.* 513.* So where all the creditors of a man sign an agreement to give him time for the payment of their respective debts by instalments, and to take promissory notes for the amount, such agreement is binding upon each, the signing by the others being a sufficient consideration, and they cannot sue for the original debt. *Boothbey v. Sowden*, 3 *Campb.* 175; see also *Wood v. Roberts*, 2 *Stark.* 417.† But to operate as a satisfaction, the composition must be paid; and therefore, where the plaintiff had agreed with the defendant and the rest of the defendant's creditors to take a composition secured by the defendant's notes, and, on defendant assigning certain debts to the creditors, to execute a general release, and all the other creditors accepted the composition and executed the release, it was held that the plaintiff, although he might have received his notes had he applied for them, not having received them, might sue on his original demand, no tender of the notes having been made. *Crawley v. Hillary*, 2 *M. and S.* 120; and see *Walker v. Seaborne*, 1 *Taunt.* 526. But had the notes been tendered, it would, as it seems, have been sufficient. Thus, where the defendant's creditors agreed to take a composition on their respective debts, to be secured partly by the acceptances of a third person, and partly by the defendant's own notes, and to execute a composition deed containing a clause of release, it was held by Lord Ellenborough that a creditor who had come in under the agreement, and to whom the acceptances and notes were regularly tendered, but who had refused to execute the composition deed after it had been executed by all the other creditors, could not sue for his original debt. *Bradley v. Gregory*, 2 *Campb.* 383; but see *Peytoe's case*, 9 *Rep.* 79 *b*, *supra*. See also *Butler v. Rhodes*, 1 *Esp.* 236. In the following case the literal performance of the stipulations in the composition deed was dispensed with. A. being insolvent, by agreement stipulated to assign his property immediately, the creditors consenting that the business should be carried on for their benefit until the next Michaelmas, and that then the property should be divided amongst them; and the insolvent accordingly assigned his effects. At the next Michaelmas several of the creditors who had signed the instrument agreed that the business should be carried on by the trustees for a further time. It was held that a creditor who had signed the first agreement, but who had not in any way concurred in the second, could not maintain an action against the insolvent for a debt existing at the time of the first agreement. *Cork v. Saunders*, 1 *B. and A.* 46.

* 10 Eng. Com. Law Reps. 393. † 3 *Id.* 411.

Coverture.

The coverture of the defendant at the time of the contract entered into is usually a good defence under the general issue, but in some cases a married woman has been allowed to be sued as a feme sole. If the wife of a foreigner resident abroad live and trade here as a feme sole, she may be sued as such. *De Guillon v. L'Aigle*, 1 B. and P. 357. And where a French emigrant left his wife in this country, and resided himself abroad, Lord Kenyon held that this was tantamount to an abjuration of the realm in a native, and that the wife might be sued as a feme sole. *Walford v. Duchess de Piennes*, 2 Esp. 554. *Francks v. Same*, *Id.* 587. But in a similar case Lord Ellenborough held that the wife was not so liable, and the Court of King's Bench concurred in that opinion. *Kay v. Duchess de Piennes*, 3 Campb. 123. A feme covert living apart from her husband, and having a separate and sufficient maintenance, cannot be sued as a feme sole. *Marsh. v. Rutton*, 8 T. R. 545. Nor can the wife of an Englishman who is resident abroad be so sued. *Marsh v. Hutchinson*, 2 B. and P. 226; and see *Bogget v. Frier*, 11 East, 301. Even a divorce *à mensâ et thoro* for adultery does not so far destroy the relation of husband and wife as to render the latter liable as a feme sole. *Lewis v. Lee*, 3 B. and C. 291.* But after a divorce *ab initio* the wife becomes a single woman by operation of law, and it is the same as if she had always remained single. *Anstey v. Manners, Gow*, 11.† And so where the husband has abjured the realm. *Lean v. Schultz*, 2 W. Bl. 1199, 3 B. and C. 297,* or been transported for a limited period, the wife is to be considered as a feme sole. *Carrol v. Blacow*, 4 Esp. 27. See 2 B. and P. 233.

Where coverture is the defence, the defendant may prove her marriage by a copy of the register, with proof of identity, *ante*, p. 62; or by the usual presumptive evidence of marriage, reputation and cohabitation. *Leader v. Barry*, 1 Esp. 353. *Kay v. Duchess of Piennes*, 3 Campb. 123. *Birt v. Barlow*, Dougl. 186. And she must show that her husband was living at the time of the debt contracted. If she shows him to have been alive within seven years it will be sufficient. *Hopewell v. De Pinna*, 2 Campb. 113, *ante*, p. 18. Acknowledgments by the defendant, and the person whom she alleges to be her husband, of their marriage, without actual proof of the marriage, or of reputation of marriage, are insufficient to prove the coverture. *Wilson v. Mitchell*, 3 Campb. 394.

Fraud.] The proof of fraud in the party seeking to enforce a contract is a good defence. Thus, where the defendant erroneously supposed that a picture had been in the possession of Sir F. Agar, and purchased it from the agent of the plaintiff, who was

* 10 Eng. Com. Law Reps. 84.. † 5 Id. 441.

aware of the error, but did not undeceive the defendant, Lord Ellenborough held that the plaintiff could not recover the sum for which the picture was sold. *Hill v. Gray*, 1 Stark. 434.* So where goods are falsely described as "the property of a gentleman deceased." *Per Lord Mansfield, Bexwell v. Christie, Cowp.* 395. So where, at a sale by auction, the owner of the goods employs a person to bid for him, and the buyer has no notice of such appointment, it is a fraud, and the seller cannot recover the price. *Crowder v. Austin*, 3 Bingh. 368.* 2 C. and P. 219, S. C. *Wheeler v. Collier*, 1 M. and M. 126. *Vide ante*, p. 138.

Illegality.] Where a contract is illegal or immoral, it cannot be enforced, and proof of its illegal or immoral nature will be a defence to the action. Thus, if goods are sold to be applied to an illegal purpose, with the knowledge of the vendor, an action cannot be maintained, as in the case of brewers' drugs. *Langton v. Hughes*, 1 M. and S. 593. So in the case of bricks under the statutable size. *Law v. Hodgson*, 11 East, 300.

So in an action for work and labour, the illegality of the transaction will be a defence. A party will not be permitted to sue either for work and labour done, or materials provided, where the whole combined forms one entire subject-matter, made in violation of the provisions of an act of parliament. *Bensley v. Bignold*, 5 B. and A. 335.* So the printer of an immoral and libellous book cannot maintain an action for his bill against the publisher who employed him. *Poplett v. Stockdale, R. and M.* 337; and see *Coates v. Hutton*, 3 Stark. 61.*

But where the party seeking to enforce the contract has been guilty of contravening a law made, not for the protection of the public, but of the revenue only, this is not such an illegality as will prevent him from recovering at law. *Brown v. Duncan*, 10 B. and C. 93; and see *Hodgson v. Temple*, 5 Taunt. 181,* *Johnson v. Hudson*, 11 East, 180.

Illegality.—Sale of spirituous liquors.—Drunkenness.] By stat. 24 Geo. II. c. 40, s. 12, "No person or persons whatsoever shall be entitled unto, or maintain any action, cause, or suit for, or recover, either in law or equity, any sum or sums of money, debt or demands whatsoever, for or on account of any spirituous liquors, unless such debt shall have really been and *bonâ fide* contracted at one time to the amount of twenty shillings or upwards; nor shall any particular article or item in any account or demand for distilled spirituous liquors be allowed or maintained, where the liquors delivered at one time, and mentioned in such article or item, shall not amount to the full value of twenty shillings at the least, and that without fraud or covin, and where no part of the liquors so

*2 Eng. Com. Law Reps. 459. *13 Id. 11. *7 Id. 121. *14 Id. 163. *1 Id. 67.

sold or delivered shall have been returned, or agreed to be returned, directly or indirectly." This statute does not extend to the case of a person who purchases liquors in small quantities to retail them again, as the keeper of an eating-house. *Jackson v. Attrill, Peake, 180 a. Gilpin v. Rundle, 1 Selw. N. P. 61, 4th ed.* But it applies to the case of a tavern-keeper's bill which the defendant has contracted, and in which there are items for spirits supplied to the defendant's guests. *Burnyeat v. Hutchinson, 5 B. and A. 241.** And a bill of exchange, part of the consideration of which is for spirituous liquors sold in less quantities than twenty shillings, is wholly void. *Scott v. Gilmore, 3 Taunt. 226. Gaitskill v. Greathead, 1 D. and R. 359.*† But where a bill had been accepted by an officer in payment of small quantities of spirits under twenty shillings, supplied for recruits and others under the defendant's command, Lord Ellenborough was of opinion that the bill was not invalid. *Spencer v. Smith, 3 Campb. 9.*

Drunkenness being a punishable offence, a publican cannot recover for beer furnished to third persons by order of the defendant, if the defendant has previously become intoxicated by drinking in his house. *Brandon v. Old, 3 C. and P. 440.*‡

Illegality—Sunday.] By 29 Car. II. c. 7, s. 1, no tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any worldly labour, business, or work, of their ordinary callings, upon the Lord's-day, or any part thereof (works of necessity and charity alone excepted). Upon this statute it has been held that a horse-dealer cannot maintain an action upon a contract for the sale and warranty of a horse, made by him upon a Sunday. *Finnell v. Ridler, 5 B. and C. 408.*§ But where A. not knowing that B. was a horse-dealer, made a verbal bargain with him on a Sunday for the purchase of a horse, and the price which was above 10*l.* was then specified, and the horse warranted, but it was not delivered till the following Tuesday, when the money was paid, it was held that there was no complete contract till the delivery of the horse, and consequently that the contract was not void under the statute. *Bloxsome v. Williams, 3 B. and C. 232.*¶ Though the contract was made by an agent, and the objection is taken by the party at whose request it was entered into on the Sunday, it cannot be enforced. *Smith v. Sparrow, 4 Bingh. 84.*‡ But where goods were bought on a Sunday, and the purchaser afterwards, while the goods were in his possession, made a promise to pay for them, it was held that the seller was entitled to recover on a *quantum meruit*. *Williams v. Paul, 6 Bingh. 653.*¹ The statute does not make every work or business done on the Lord's-day illegal, the object of the statute being to prevent persons carrying on their trade and ordinary occupations and callings on the Lord's-

* 7 Eng. Com. Law Reps. 83. † 16 Id. 42. ‡ 14 Id. 384. § 11 Id. 261.

¶ 10 Id. 60. ‡ 13 Id. 351. 19 Id. 192.

day. Therefore, the hiring of a servant by a farmer on a Sunday is good. *R. v. Whitnash*, 7 B. and C. 596.^a See also *Begbie v. Levi*, 1 Crom. and Jerv. 180.

Immorality.] One who is party to an immoral contract cannot enforce it. Thus the price of obscene or libellous prints cannot be recovered. *Fores v. Johnes*, 4 Esp. 97. So an action for use and occupation will not lie if the plaintiff knew that the premises were to be occupied for the purpose of prostitution. *Jennings v. Throgmorton, R. and M.* 251, *ante*, p. 147. And where an action was brought against the defendant for board and lodging, and it appeared that she was a prostitute, and had boarded and lodged with the plaintiff who kept a house of ill-fame, and who, besides what she received for the board and lodging of the defendant, partook of the profits of her prostitution, Lord Kenyon was of opinion, that such a demand could not be heard in a court of justice. *Haward v. Hodges*, Selw. N. P. 67, 4th ed. But a person may recover the amount of goods sold to a prostitute, unless he expects to be paid out of the profits of her prostitution, and sells her the clothes to enable her to carry it on. *Bowry v. Bennett*, 1 Campb. 348. So where the plaintiff was employed to wash clothes for a prostitute, and knew her to be such, and the clothes consisted principally of expensive dresses, and some gentlemen's night-caps, it was held that he was entitled to recover. *Lloyd v. Johnson*, 1 B. and P. 340.

Insolvency—discharge under the insolvent act.] By the general insolvent act 7 Geo. IV. c. 57, s. 76, a copy of the petition, schedule, order, and other orders and proceedings under the act purporting to be signed by the officer in whose custody the same shall be, or his deputy, certifying the same to be a true copy of such petition, schedule, order, or other proceeding, and sealed with the seal of the insolvent court, shall, at all times, be admitted in all courts whatever, and before commissioners of bankrupts, and justices of the peace, as sufficient evidence of the same, without any proof whatever given of the same, further than that the same is sealed with the seal of the said court as aforesaid. The power given by this clause of offering a certified copy in evidence does not take away the right of the party to give the original order of adjudication in evidence. *Northam v. Lalouche*, 4 C. and P. 143.^a Where a defendant pleads that he was discharged under the above act, and the replication denies that such discharge took place, the defendant need not prove the filing of the petition. *Andrews v. Pledger*, 4 C. and P. 274,^o 1 M. and M. MSS. S. C. The only evidence which appears to be necessary under the plea of discharge is, the copy of schedule to show that the defendant is discharged from the debt in question, and the copy of the adjudication to prove the actual discharge.

^a 14 Eng. Com. Law Reps. 100. ^o 19 Id. 314. • 19 Id. 381.

Under the former insolvent act, 53 Geo. III. c. 102, s. 16, it was held that an order made by the insolvent court for the discharge, and delivered to the gaoler in whose custody the prisoner was, was evidence of the discharge. *Neal v. Isaacs*, 4 B. and C. 335, 6 D. and R. 484, S. C. By 7 Geo. IV. c. 57, s. 54, the court is directed to issue a warrant to the gaoler for the discharge.

Infancy.

That the defendant was an infant at the time of the contract made; is a good defence (unless the action be for necessities), and may either be pleaded or given in evidence under the general issue. But where the action, though in form *ex contractu*, is in fact founded upon the *tort* of the defendant, his infancy will be no defence. Thus an action for money had and received will lie against an infant for money which he has embezzled. *Bristow v. Eastman*, 1 Esp. 172.

What are necessities.] An infant may bind himself for necessities, that is, for meat, drink, apparel, medicines, and similar necessities, and also for his good teaching, or instruction. *Co. Litt. 172. a. Com. Dig. Infant* (B. 5). The question of necessities is a relative fact to be governed by the fortune and circumstances of the infant, and the proof of those circumstances lies on the plaintiff. *Per Lord Kenyon, Ford v. Fothergill*, 1 Esp. 211. Whether necessities or not is a mixed question of law and fact. *Maddox v. Miller*, 1 M. and S. 738. An infant, being a captain in the army, is liable for a livery ordered by him for his servant, though not for cockades for the soldiers of his company. *Hands v. Slaney*, 8 T. R. 578; and see *Coates v. Wilson*, 5 Esp. 152. So an infant may bind himself to pay a fine due upon his admission to a copyhold estate. *Evelyn v. Chichester*, 3 Burr. 1717. So for necessities supplied to his wife. *Turner v. Trisby*, 1 Str. 168. B. N. P. 155. So for money advanced in order to liberate him when taken in execution for necessities. *Clarke v. Leslie*, 5 Esp. 28.

What are not necessities.] Although an infant may enter into a partnership, yet he will not be liable for the contracts of the partnership entered into during his infancy, but he will be liable upon such contracts entered into subsequently to his attaining his full age, unless he notifies his disaffirmance of the partnership. *Goode v. Harrison*, 5 B. and A. 147.^a It is the duty of a tradesman dealing with an infant to make inquiries from the parents, for if the infant is supplied with necessities by them, the tradesman cannot recover for those which he has furnished. *Cook v. Deaton*, 3 C. and P. 114.^a An infant is not liable upon an account stated, even though it appears to be for necessities; nor can

^a 10 Eng. Com. Law Reps. 350. ^a 7 Id. 49. ^a 14 Id. 232.

the account stated be used as evidence by way of admission on the part of the defendant to show that necessaries have been supplied to that amount. *Ingledeu v. Douglas*, 2 Stark. 36.* Nor on a bill of exchange, though given for necessaries. *Williamson v. Watts*, 1 Campb. 552. But he will be liable on a bill accepted after twenty-one, though drawn before. *Stevens v. Jackson*, 4 Campb. 164. However, where goods were delivered to a carrier for an infant, the infant cannot be charged, though the goods do not reach him till after he is of age, for the property vests on the delivery to the carrier. *Griffin v. Langfield*, 3 Campb. 254. An infant cannot be sued on a warranty of a horse. *Howlett v. Haswell*, 4 Campb. 118. When an infant lives with his parent, who provides such apparel as appears to the parent to be proper, so that the child is not left destitute of clothes or other real necessities of life, it seems that the child cannot bind himself to a stranger, even for what might otherwise be allowed as necessaries. *Per Gould, J., Bainbridge v. Pickering*, 2 W. Bl. 1325. And it is incumbent upon a tradesman before he trusts an infant with necessaries, to inquire whether he is provided by his friends. *Ford v. Fothergill, Peake*, 229, 1 Esp. 211, S. C. An infant is not liable for money lent, though it has been laid out in necessaries. *Darby v. Boucher*, 1 Salk. 279. *Probart v. Knouth*, 2 Esp. 472 (n). It has been held that an infant, lieutenant in the navy, is not liable for the price of a chronometer, he being out of employment at the time of its being furnished. *Berolles v. Ramsay, Holt*, 77.†

Ratification after full age.] If infancy is pleaded, the plaintiff may reply (or if not pleaded, but shown under the general issue, may give in evidence) that the defendant ratified and confirmed the contract after he attained the age of twenty-one, and before action brought. *Thornton v. Illingworth*, 2 B. and C. 824.‡ A bare acknowledgment, or part payment after age, will not be sufficient, there must be an express promise; *Thrupp v. Fielder*, 2 Esp. 628; and such promise must be voluntary. *Harmer v. Killing*, 5 Esp. 102. A contract made by an infant for goods for the purposes of trade is absolutely void, not voidable only. The law considers it against good policy, that he should be allowed to bind himself by such contracts. If he makes a promise after he comes of age, that binds him, on the ground of his taking upon himself a new liability upon a moral consideration existing before, it does not make it a legal debt from the time of making the bargain; *per Bayley, J., Thornton v. Illingworth*, 2 B. and C. 826;§ the defendant therefore will not be bound beyond the extent of his new promise, as when he promises to pay half-a-crown in the pound on the whole debt, he is not liable beyond that sum. *Green v. Parker*, 1 Esp. Dig. 198, *Peake, Ev.* 297, S. C. By Lord Tenterden's Act, 9 Geo. IV. c. 14,

* 3 Eng. Com. Law Reps. 233. † 3 Id. 32. ‡ 9 Id. 256.

s. 5. No action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age, of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing to be signed by the party to be charged therewith.

Where the defendant pleads infancy, and the plaintiff replies a ratification of the promises, &c. after twenty-one, the plaintiff need only in the first instance prove a promise, and it lies upon the defendant to prove his infancy, as it is a fact peculiarly within his own knowledge; *Bothwick v. Carruthers*, 1 T. R. 648; but if the plaintiff, to the plea of infancy, replies that the goods were necessities, the defendant need not prove his infancy, but the plaintiff must in the first instance show that the goods were necessities.

Infancy may be proved by calling any person who can speak to the time of the defendant's birth, or by declarations of deceased members of his family, mentioning the time of his birth, with proof of identity, *ante*, p. 18. The register of his baptism is not of itself evidence of the time of his birth, *ante*, p. 115. But the register of birth, with proof of identity, is good evidence. *Leader v. Barry*, 1 Esp. 354.

Insanity.

It is a good defence that the defendant at the time of the contract entered into was of unsound mind, and that the plaintiff took advantage of that circumstance to impose upon him. *Brown v. Joddrell*, 1 M. and M. 105. *Levy v. Baker*, *id.* 106 (n). *Sentance v. Poole*, 3 C. and P. 1.*

Payment.

Payment may be given in evidence under the general issue, unless made after the writ issued, in which case it must be pleaded specially, or the plaintiff will be entitled to a verdict with nominal damages. *Holland v. Jourdine*, Holt, 6;† see *Francis v. Crywell*, 5 B. and A. 886;‡ *Nelson v. Wilson*, 6 Bingh. 568.†

To whom and how.] Payment to an authorised agent is sufficient. See *Goodland v. Blewith*, 1 Campb. 477; *Coates v. Lewis*, *id.* 444; *Owen v. Barrow*, 1 Bos. and Pul. N. R. 101. Thus payment to an attorney while an action is subsisting is good, but otherwise to his clerk who shows no other authority than his master's orders to receive it. *Per Lord Kenyon*, *Coore v. Callaway*, 1 Esp. 115. So payment to the attorney's agent is not good. *Yates v. Freckleton*, Dougl. 600. But payment to a person found in a merchant's counting house, and appearing to be entrusted with the conduct of the business there, is a good payment to the merchant, though the per-

* 11 Eng. Com. Law Reps. 179. † 8 Id. 5. ‡ 7 Id. 289. † 19 Id. 168.

son was in fact never employed by him. *Barrett v. Deere*, 1 M. and M. 200; and see *Wilmot v. Smith*, *id.* 238, *post*. Where a creditor directs his debtor to transmit money by the post, and it is lost, the creditor must bear the loss; *Warwicke v. Noakes, Peake*, 67, a; and where no directions are given about the mode of remittance, yet this being done in the usual way of transacting business, it seems that the debtor is discharged. *Per Lord Kenyon, ibid.* But if the letter is delivered to the bellman in the street, and is lost, it is no payment. *Hawkins v. Rutt, Peake*, 186.

Payment by an attorney to a creditor will support an averment of payment by the principal, though the latter has not repaid his attorney, but has only given him a promissory note. *Adams v. Dansey*, 6 Bingh. 506.*

Application of payments.] In general the party who pays money has a right to direct the application of it, but where money is paid to a creditor generally, without any specific appropriation by the party paying, and the creditor has several demands against the party paying, he may apply the money paid to which of those demands he pleases. *Hall v. Wood*, 14 East, 243 (n). *Clayton's case*, 1 Merivale, 572. The creditor need not apply it to any particular demand at the moment of payment, but has a right to make the application at a subsequent period; nor will an entry in his books, applying it to a particular demand, but not communicated to the party paying, preclude him from applying it afterwards to another demand. *Simson v. Ingham*, 2 B. and C. 65.* The creditor may apply the payment to the discharge of a prior and purely equitable demand, and sue his debtor at law for the subsequent legal debt, *Bosanquet v. Wray*, 6 Taunt. 597; * but see *Birch v. Tebbutt*, 2 Stark. 74.* So where the party paying is indebted to the party receiving for a sum due from his wife, *dum sola*, and also on another demand, the party receiving may apply the money to the first demand. *Goddard v. Cox*, 2 Str. 1194:

But in some instances the law will direct the application of money paid generally. Thus where one of several partners dies, and the partnership is in debt, and the surviving partners continue their dealings with a particular creditor, and the latter joins the transactions of the old and new firm in one entire account, the payments made from time to time by the surviving partners must be applied to the old debt. *Per Bayley, J., Simson v. Ingham*, 2 B. and C. 72.* *Clayton's case*, 1 Meriv. 572. *Brooke v. Enderby*, 2 B. and C. 71.* So payments by a debtor to surviving partners from time to time, upon one general account including the old debt, are to be applied in the first place to such old debt; *Bodenham v. Purchas*, 2 B. and C. 39; but where the old debt is not brought into the new account, general payments on the new account are not to be considered as made in discharge of the old debt. *Simson v.*

* 19 Eng. Com. Law Reps. 149. * 9 Id. 25. * 1 Id. 495. * 3 Id. 253.

* 9 Id. 28. * 6 Id. 23.

Ingham, 2 B. and C. 65.¹ And where there are distinct demands, one against persons in partnership, and another against one only of the partners, if the money paid be the money of the partners, the creditor is not at liberty to apply it to the debt of the individual. *Thompson v. Brown*, 1 M. and M. 40. Where payments are made upon one entire account, they are to be considered as payments in discharge of the earlier items. *Per Bayley, J., Bodenham v. Purchas*, 2 B. and A. 46. *Williamson v. Rawlinson*, 3 Bingh. 76.² Where security had been given by a surety for goods to be supplied to his principal, and not in respect of a previously existing debt, and payments were made from time to time by the principal, in respect of some of which discount had been allowed for prompt payment, (the goods having been sold on credit,) it was held that it was to be inferred in favour of the surety, that the payments were in liquidation of the latter account; *Marryatts v. White*, 2 Stark. 101;³ but the law will not, in favour of a surety, direct the application of money paid generally in discharge of the debt secured, without some circumstances to show that it was so intended. *Plomer v. Long*, 1 Stark. 163.⁴ *Williams v. Rawlinson*, 3 Bingh. 71.⁵

When A. has a demand against B. as executor, and also another demand against him in his own right, and B. makes a general payment, A. cannot apply it to the former demand; *Goddard v. Cox*, 2 Str. 1194; and where there are two demands, one legal and the other illegal, and a general payment is made, the law will apply it to the discharge of the legal demand. *Wright v. Laing*, 3 B. and C. 165.⁶

As to cases in which payment will be presumed, *vide ante*, p. 14, and as to the proof of payment by receipts, *ante*, p. 26.

Payment by bill or note.] If the seller of goods take notes or bills for them, without agreeing to run the risk of the notes being paid, and they turn out to be worth nothing, this will not be considered as payment. *Owen v. Morse*, 7 T. R. 64. *Swinyard v. Bowes*, 5 M. and S. 62. But if the seller agree to run the risk of the bill being, and to take it as payment or cash, he cannot, on the dishonour of the bill, resort to his original cause of action; *Ward v. Evans*, 2 Salk. 442, 7 T. R. 66; and where the purchaser gives the seller an order upon a third person entitling him to receive cash, instead of which the vendor elects to take a bill, in such case though the bill is dishonoured the purchaser is discharged. *Vernon v. Boverie*, 2 Show. 296. *Smith v. Ferrand*, 7 B. and C. 19.¹ But it is otherwise if the order is upon the purchaser's agent, and the seller takes from him a check which is dishonoured. *Everett v. Collins*, 2 Campb. 515, 7 B. and C. 24, 25.² Where the master of a vessel took from the freighter's agent abroad, who was furnished with funds to pay him the freight, a bill upon a third person, which was

¹ 9 Eng. Com. Law Reps. 25. ² 11 Id. 36. ³ 3 Id. 256. ⁴ 2 Id. 334.

⁵ 10 Id. 44. ⁶ 14 Id. 6.

dishonoured, it was held by Gibbs, C. J., that the freighter was not thereby discharged. *Marsh v. Pedder*, 4 *Campb.* 257. If the master of a vessel is to get payment in the best mode he can, and has no power to get any thing but a bill, he must take that, but if he could get paid in any other mode, he should do so, otherwise he will be bound by taking a bill. *Per Bayley, J., Strong v. Hart*, 6 *B. and C.* 161; ¹ and see *Taylor v. Briggs*, 1 *M. and M.* 28. *Robinson v. Read*, 9 *B. and C.* 449.²

Payment by bills is *prima facie* evidence of payment, without showing that such bills were paid; it is for the plaintiff to show that they have been dishonoured; *Hebden v. Hartsink*, 4 *Esp.* 46; *Stedman v. Gooch*, 1 *Esp.* 4; and where the purchaser gave the seller of goods an order on his banker for "a good bill on London," to the amount of the goods, and the seller took a bill which was afterwards dishonoured, Lord Kenyon held that it was incumbent on the seller to take care that he got a good bill, and that he could not on its being dishonoured have recourse to his demand for goods sold. *Bolton v. Reichard*, 1 *Esp.* 106. So where goods were sold "without recourse to the buyer in case of non-payment," for a bill which the vendee knew to be worth nothing, it was held that the vendor could not sue in *assumpsit* for the price of the goods, but that his remedy was an action of tort. *Read v. Hutchinson*, 3 *Campb.* 352. Where a bill indorsed in blank is taken by the vendor for goods, and lost before it is paid, the vendor can neither recover for the price of the goods nor upon the bill. *Champion v. Terry*, 3 *B. and B.* 295.³ But where the purchaser of goods accepted a bill drawn in favour of the seller, who lost it before he indorsed it, it was held that this was no defence in an action for the value of the goods. *Rolt v. Watson*, 4 *Bingh.* 273.⁴

Release.

A release may be given in evidence under the general issue. *Miller v. Aris*, 3 *Esp.* 234. After breach the contract can only be discharged by a release under seal, but before breach it may be discharged by parol, *ante*, p. 11.

Set-off.

It is only necessary to plead or give notice of a set-off where there are cross demands; for where the nature of the employment, transaction, or dealings, necessarily constitutes an account consisting of receipts and payments, debts and credits, the *balance* only is the debt. See *Green v. Farmer*, 4 *Burr.* 2221.

A set-off may be either pleaded or given in evidence under the general issue, but in the latter case notice of the set-off must be given at the time of pleading, 2 *Geo. II. c. 22*, s. 13; and it will be necessary to prove the delivery of the notice at the trial. *Tidd*, 721. When the defendant has a set-off against the plaintiff,

¹ 13 *Eng. Com. Law Reps.* 130. ² 17 *Id.* 418. ³ 7 *Id.* 443. ⁴ 13 *Id.* 430.

of which he gives notice, but does not appear at the trial to offer evidence in support of it, the plaintiff may either take a verdict for the whole sum he proves to be due to him, subject to be reduced to the sum really due on a balance of accounts, if the defendant will afterwards enter into a rule not to sue for the debt intended to be set-off, or it is said he may take a verdict for the smaller sum, with a special indorsement on the *postea*, as a foundation for the court to order a stay of proceedings, if another action should be brought for the amount of the set-off. *Laing v. Chatham*, 1 *Campb.* 252. *Tidd*, 721. Notice of set-off can only be given where the general issue is pleaded without any other plea. *Webber v. Venn, R. and M.* 413.

Where the defendant pleaded by way of set-off a bond given to him by the plaintiff, conditioned for payment of an annuity to a third person, which had been previously granted by the defendant, and that a certain sum was in arrear, it was held that the defendant was not bound to prove that he had paid the money in order to set it off, but that on production of the bond the plaintiff was bound to prove payment. *Penny v. Foy*, 8 *B. and C.* 11.^a

Nature of the debt set-off and of the debts against which it is set-off.] A set-off is allowed notwithstanding the debts are of a different nature, unless in cases where either of the debts shall accrue by reason of a penalty in any bond, or specialty, in which case the debt intended to be set-off must be pleaded in bar, and in the plea must be shown how much is justly due on either side. 8 *Geo. II. c. 24, s. 4.* The demand intended to be set-off must be liquidated. *Freeman v. Hyett*, 1 *W. Bl.* 394. Thus a guarantee of a certain sum of money cannot be set-off. *Crawford v. Stirling*, 4 *Esp.* 207. So in an action by a servant against his master for wages, the latter cannot set-off the value of goods lost by the negligence of the former; but if it should be proved to be part of the original contract, that the servant should pay out of his wages the value of his master's goods lost through his negligence, this would be tantamount to an agreement that the wages should be paid only after deducting the value of the things so lost, which would be a good defence under the general issue. *Le Loir v. Bristow*, 4 *Campb.* 134. A stipulated sum to be paid on the non-performance of certain work as stipulated liquidated damages, may be the subject of a set-off. *Fletcher v. Dych*, 2 *T. R.* 32. A judgment may be pleaded by way of set-off, though a writ of error be pending thereon; *Reynolds v. Beering*, cited 3 *T. R.* 188; see *Curling v. Innes*, 2 *H. Bl.* 372; and where in an action on a promissory note of 30*l.* the plaintiff took a verdict for the whole sum, and the defendant had at the same sittings an action against the plaintiff for 11*l.*, to which there was a notice to

^a 15 Eng. Com. Law Reps. 146.

set-off the note of hand, the court held that notwithstanding the verdict, the note might be set-off. *Baskerville v. Brown*, B. N. P. 180. 2 Burr. 1229, S. C. *Evans v. Prosser*, 3 T. R. 186. A debt cannot be set-off till the time at which it is actually due. *Rodgers v. Ladbroke*, 1 Bingh. 99.* A debt barred by the statute of limitations cannot be set-off; if pleaded, the plaintiff may reply the statute; if given in evidence under a notice, it may be objected to at the trial. B. N. P. 180.

With regard to the nature of the demand against which the set-off is claimed, it is held that it must be for liquidated damages. Therefore in assumpsit for not indemnifying the plaintiff against certain accommodation acceptances, whereby he was forced and obliged to pay to the holders of the bills certain sums of money, with interest, charges, and expenses, it was held that a set-off could not be pleaded; *Hardcastle v. Netherwood*, 5 B. and A. 93; *Auber v. Lewis*, Mann. Index, 251; but the defendant might, perhaps, have pleaded a set-off to that part of the count which charged him with the amount of the acceptances paid by the plaintiff. *Per Cur. ibid.* And where the plaintiff declared specially in assumpsit for not accounting, with a count for money had and received, and non-assumpsit was pleaded to the whole declaration, and a set-off to the general count, and the plaintiff proved a balance due to him, which might have been recovered under either count, Gibbs, C. J., held that the defendant might avail himself of his set-off. *Birch v. Depeyster*, 4 Campb. 387.

The demands must be mutual, and due in the same right.] In order to constitute a valid set-off the demands must be mutual, and due in the same right.

Bankrupts.] By stat. 6 Geo. IV. c. 16, s. 16, where there has been mutual credit given by the bankrupt and any other person, or where there are mutual debts between the bankrupt and any other person, the commissioners shall state the account between them, and one debt or demand may be set against another, notwithstanding any prior act of bankruptcy committed by such bankrupt before the credit given to, or the debt contracted by, him; and what shall appear due on either side, on the balance of such account, and no more, shall be claimed or paid on either side respectively; and every debt or demand thereby made proveable against the estate of the bankrupt, may also be set-off in manner aforesaid against such estate; provided that the person claiming the benefit of such set-off had not, when such credit was given, notice of an act of bankruptcy, by such bankrupt committed. It seems that under this act, a set-off, or mutual credit, may be given in

* 8 Eng. Com. Law Reps. 260. * 7 Id. 37.

evidence under the general issue. See similar clause, in 5 Geo. II. c. 30, s. 28. *Vide post*, "Actions by Assignees of Bankrupts."

Executors.] By 2 Geo. II. c. 22, s. 13, where either party sues or is sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set against the other. But in an action by an executor in his own name, to recover money due to the testator in his lifetime, and received by the defendant after his death, the defendant cannot set-off a debt due to him from the testator. *Shipman v. Thompson, Willes*, 103.

Factors and Agents.] An agent employed to recover a sum of money is entitled to retain a just allowance for his labour and service therein, and as such allowance is not in the nature of a cross demand, or mutual debt, he may give it in evidence under the general issue. *Dale v. Sollet*, 4 Burr. 2133, *ante*, p. 250. Where a factor sells goods without disclosing the name of his principal, the purchaser, in an action by the principal for the price, may set-off a debt due to himself from the factor; *Rabone v. Williams*, 7 T. R. 360 (n), *George v. Clagett*, 7 T. R. 359, *Carr v. Hincliffe*, 4 B. and C. 547; and may give such matter in evidence under the general issue. *Ibid.* Yet if before they are all delivered, and before any part of them is paid for, the purchaser is informed that they belonged to a third person, in an action by the latter, the purchaser cannot set-off a debt due to him by the factor, for this is not a case of mutual credit. *Moore v. Clementson*, 2 Campb. 22. A broker (whose character differs materially from that of a factor), in selling goods without disclosing the name of his principal, acts beyond the scope of his authority, and the buyer therefore cannot set-off a debt due from the broker to him in an action for the goods by the principal. *Baring v. Corrie*, 2 B. and A. 137; see *stat.* 6 Geo. IV. c. 94, s. 1, 2. 6.

Husband and wife.] A debt due to a man *jure uxoris*, cannot be set-off in an action against him on his own bond; *B. N. P.* 179; nor can a debt due from a wife, *dum sola*, be set-off in an action brought by the husband alone, unless he has made himself individually liable. *Wood v. Akers*, 2 Esp. 594.

Partners.] A debt due to a surviving partner may be set-off against a demand upon him in his own right. *Slipper v. Stidstone*, 5 T. R. 493, and *converso*, *French v. Andrade*, 6 T. R. 582. In an action brought by an ostensible and dormant partner, the defendant may set-off a debt due to him from the ostensible partner only, *Stacy v. Decy*, 2 Esp. 489, 7 T. R. 361 (n), S. C.; and where a note was given by D. to his bankers, A., B., and C., who indorsed

it to B. and C., who carried on business separately, it was held by Lord Kenyon, that in an action on the note by B. and C., D. might set-off a demand due to him from A., B., and C. *Buller v. Roe, Peake*, 197.

Statute of Limitations.

The Statute of Limitations must be pleaded, and cannot be given in evidence under *non-assumpsit*. 2 *Saund.* 63 b (n).

When the statute begins to run.] In assumpsit the statute begins to run from the time of the breach of promise. Therefore in an action against an attorney, in which it was stated as a breach, that the defendant neglected to make a search at the Bank of England, to ascertain whether certain stock was standing in the names of certain persons, it was held that the omission to search having taken place upwards of six years before, the statute was a bar, though the omission was not discovered till within the six years. *Short v. McCarthy*, 3 B. and A. 626.* *Brown v. Howard*, 2 B. and B. 73.* *Balley v. Faulkner*, 3 B. and A. 288.* So in tort. *Howell v. Young*, 5 B. and C. 259,† *vide post*. So where a bill of exchange is drawn, payable at a future period, for the amount of a sum of money lent by the payee to the drawer at the time of drawing the bill, the payee may recover in an action for money lent, at any time within six years from the time when the money was to be repaid, i. e. when the bill became due, and not from the time of the loan. *Wittersheim v. Countess of Carlisle*, 1 H. Bl. 631. When a note is payable on demand, it is payable immediately, and the statute begins to run from the date; *Christie v. Fonsick, Selw. N. P.* 131; see *Mann. Index*, 202; but where a note is made payable 24 months after demand, the cause of action does not accrue, and the statute does not begin to run until 24 months after demand made; *Thorpe v. Booth, R. and M.* 388; so where the note is payable after sight, the statute runs only from the time of presentment. *Holmes v. Kerrison*, 2 Taunt. 323; and see *Savage v. Aldren*, 2 Stark. 232.‡ Where the cause of action does not arise until after request made, the statute will only run from the time of such request. *Gould v. Johnson*, 2 Salk. 422, 2 *Saund.* 63, b (n).

Subsequent acknowledgment.] The effect of the statute of limitations may be avoided, by proof of an acknowledgment of the debt within six years, which acknowledgment is said to be evidence of a *new promise* to pay the debt, and not merely operating to draw down the original promise to the time when the acknowledgment is made. *Heylin v. Hastings*, 1 Ld. Raym. 422. *Hurst v. Parker*, 1 B. and A. 93. *Pittam v. Foster*, 1 B. and C. 248.* *A'Court v. Cross*, 3 Bingh. 332.* *Boydell v. Drummond*, 2 Campb. 162;

* 5 Eng. Com. Law Reps. 403. † 6 Id. 25. ‡ 5 Id. 288. * 11 Id. 219.

† 3 Id. 329. * 8 Id. 67. * 11 Id. 124.

but see *Perham v. Raynal*, 2 Bingh. 308,^b *Thornton v. Illingworth*, 2 B. and C. 826.^c A verbal promise was formerly held sufficient to revive a written guarantee. *Gibbons v. McCasland*, 1 B. and A. 690. But the law has been altered by Lord Tenterden's Act.

Acknowledgement.—Lord Tenterden's Act.] By stat. 9 Geo. IV. c. 14. (reciting the Statute of Limitations, 21 Jac. I. c. 16, and the Irish Act 10 Car. I.) and that various questions have arisen in actions founded on simple contract, as to the proof and effect of acknowledgments and promises offered in evidence for the purpose of taking cases out of the operation of the said enactment, &c., it is enacted,

Sec. I. That in actions of debt, or upon the case, grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments, or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby; and that where there shall be two or more joint contractors, or executors, or administrators of any contractor, no such joint contractor, executor or administrator, shall lose the benefit of the said enactments, or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them; provided always that nothing therein contained shall alter or take away or lessen the effect of any payment of principal or interest made by any person whatsoever; provided also, that in actions to be commenced against two or more such joint contractors, or executors, or administrators, if it shall appear at the trial, or otherwise, that the plaintiff, though barred by either of the said recited acts, or this act, as to one or more of such joint contractors, executors, or administrators, shall nevertheless be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment, or promise, or otherwise, judgment may be given, and costs allowed for the plaintiff, as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff.

Sec. II. That if any defendant or defendants in any action on any simple contract, shall plead any matter in abatement, to the effect that any other person or persons ought to be jointly sued, and issue be joined on such plea, and it shall appear at the trial that the action could not, by reason of the said acts, or this act, or of either of them, be maintained against the other person or persons named in such plea, or any of them, the issue joined on such plea shall be found against the party pleading the same.

Sec. III. That no indorsement or memorandum of any payment,

written or made after the time appointed for this act to take effect, upon any promissory note, bill of exchange, or other writing, by or on the behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of either of the said statutes.

Sec. IV. That the said recited acts, and this act, shall be deemed and taken to apply to the case of any debt or simple contract alleged by way of set-off on the part of any defendant, either by plea, notice, or otherwise.

The effect of Lord Tenterden's act appears to be not to alter the law relating to acknowledgments and promises, sufficient to take a case out of the statute of limitations, further than by requiring such acknowledgment or promise to be in writing, and signed by the party chargeable. No alteration is introduced in the form of the acknowledgment or promise, or with regard to the party to whom it is made. The former decisions on these points are therefore still to be considered as authority. The act operates from 1st January, 1829, in cases where the promise was before that day. *Hilliard v. Lenard*, 1 *M. and M.* 297.

Upon the different clauses of Lord Tenterden's act, several cases have been decided. In an action by an administratrix in which the statute of limitations was pleaded, it appeared that the cause of action arose more than six years before, but that within six years the defendant and the agent of the plaintiff had gone over the items of the account, and struck a balance which the defendant promised verbally to pay; it was objected that this was within the 9 Geo. IV. c. 14; but Vaughan B., said, "I think the plaintiff has shown a good cause of action upon the count on an account stated. She does not go upon the original debt at all. I take the statute to apply to cases where you go for the original debt, and then give some evidence of an acknowledgment to rebut the presumption raised by the statute of limitations, that the debt has been satisfied." *Smith v. Forty*, 4 *C. and P.* 126.⁴ In an action on a bill of exchange two letters were relied on to take the case out of the statute; the first stated that the defendant would feel obliged by his correspondent's offer of assistance to settle with Mr. F. (the defendant), and in the present state of his affairs he could only say he should feel much indebted to Mr. F. to withdraw his outlawry, and that Mr. F.'s claims should receive that attention which, as an honourable man, he considered them to deserve. In the second letter the defendant stated that he was ready to do any thing, and every thing, to satisfy Mr. F. and all his creditors. There was no evidence that the defendant had been outlawed in the action. The Court held that this was not a sufficient acknowledgment. *Per Tindal C. J.*, "The question is, whether these letters constitute a distinct and unqualified acknowledgement of an existing debt. Now the first letter points to a debt on which the defendant

⁴ 19 Eng. Com. Law Reps. 305.

had been proceeded against to outlawry, and though this record might not of necessity show whether the defendant had been outlawed or not, yet unless the plaintiff proved that circumstance, his claim would not appear to be one to which the acknowledgment in the letter could apply; but neither of the letters import such a direct and unqualified acknowledgment of a debt as would authorise the Court in implying a promise to pay. They import no more than an offer on the part of the defendant to surrender his income with a view to an arrangement with his creditors, provided he should be allowed time to arrange his affairs. *Fearn v. Lewis*, 6 *Bingh.* 349,* 4 *C. and P.* 173,[†] *S. C.*

With regard to the payment of interest it has been held that a payment by one of the makers of a joint and several promissory note takes the case out of the statute, in the same manner as before the passing of the 9 Geo. IV. *Chippendale v. Thurston*, 1 *M. and M.* 411. See *Pease v. Hirst*, 10 *B. and C.* 122.

Acknowledgment—by whom.] The acknowledgment must be made, under Lord Tenterden's Act, by the party chargeable. An acknowledgment by a person to whom the defendant has referred, and who has made payments for the defendant, was formerly sufficient. *Burt v. Palmer*, 5 *Esp.* 145. The cases relating to part payment are still to be considered authority so far as they apply to the payment of interest, which is excepted from the operation of Lord Tenterden's Act. Part payment by one of several makers of a joint and several promissory note, has been held to be such an acknowledgment as to take the case out of the statute, as against all the makers; *Whitcomb v. Whiting*, *Dougl.* 652; see 1 *B. and A.* 467, 2 *B. and C.* 28. 30;[‡] though the others have signed it as sureties only; *Perham v. Raynal*, 2 *Bingh.* 306;[§] but it was ruled by Lord Ellenborough, that it is not sufficient merely to show a payment by a joint maker of a note to the payee within six years, without showing that it was made on account of the note; for an acknowledgment to bind a partner ought to be clear and distinct; *Holmes v. Green*, 1 *Stark.* 488;^{||} so where A. and B. made a joint and several promissory note, and A. died, and ten years after his death B. paid interest upon the note, it was held that such payment did not take the case out of the statute, so as to make A.'s executors liable; for B. and the executors did not remain jointly liable, nor were they liable in the same capacity. *Atkins v. Tredgold*, 2 *B. and C.* 23.[¶] And it was ruled that, as against an executor, an acknowledgment merely is not sufficient to take the case out of the statute, but there must be an express promise, and if there are several executors, a promise by all. *Tullock v. Dunn*, *R. and M.* 416. So by Lord Tenterden's Act, where there are two or more joint contractors, or executors, or administrators, there

* 19 *Eng. Com. Law Reps.* 98. † 19 *Id.* 326. ‡ 9 *Id.* 14, 15. § 9 *Id.* 413.

¶ 2 *Id.* 479. || 9 *Id.* 12.

must be a written promise or acknowledgment by each. Where an action was brought against A. and B. and C., his wife, upon a joint promissory note, made by A. and C. before her marriage, and the promise was laid by A. and C. before her marriage, and the statute of limitations was pleaded, upon which issue was joined, it was held that an acknowledgment of the note by A. within six years, but after the intermarriage of B. and C., was not evidence to support the issue. *Pittam v. Foster*, 1 B. and C. 248.¹

Acknowledgment—to whom.] An acknowledgment, being evidence of a new promise, must be to a person who is in existence to receive it; and therefore in an action by an executrix, a statement by the defendant to her, that "the testator always promised never to distress him for it," was held to be no evidence of a promise to pay, made to the testator within six years. *Ward v. Hunter*, 6 Taunt. 210. = 1 B. and C. 251.² An acknowledgment by the acceptor of a bill that he was indebted on it to the payees, but that he was not indebted to the drawer, there being no consideration for the bill, is not sufficient to take the case out of the statute, in an action by the drawer. *Easterby v. Pullen*, 3 Stark. 186.³ An acknowledgment made to a stranger that the debt is owing to the plaintiff, is sufficient; *Peters v. Brown*, 4 Esp. 46; so an acknowledgment within six years, in a deed between the defendants and third persons, of the existence of a debt due to the plaintiffs who were strangers to the deed, is sufficient to take the case out of the statute. *Mountstephen v. Brooke*, 3 B. and A. 141;⁴ and see *Clarke v. Haugham*, 2 B. and C. 149.⁵ *Halliday v. Ward*, 3 Campb. 32. An acknowledgment made to an executor or administrator, will not support a count laying the promise to the testator, or intestate. *Sarell v. Wine*, 3 East, 409, 2 Saund. 63, g (n).

Acknowledgment—what sufficient.] In many cases a very slight acknowledgment has been held sufficient.* Thus, where in answer to an application for money due from the defendant, and C. the defendant wrote, "I received your letter, and beg leave to refer you to my trustee Mr. W. H. on this complicated business. I should be glad to be informed how you have settled it with C.," Lord Kenyon held the acknowledgment sufficient. *Baillie v. Lord Inchiquin*, 1 Esp. 435. "What an extravagant bill you have delivered me!" is an acknowledgment of some money be-

¹ 8 Eng. Com. Law Reps. 67. = 1 Id. 359. = 8 Id. 68.

² 14 Id. 176. ³ 5 Id. 245. ⁴ 9 Id. 47.

* The doctrine relating to the statute of limitations has undergone a great change and the courts now endeavour to construe it fairly, instead of evading it, as they formerly did. In the case of *Bell v. Morrison*, 1 Peters, 351, the Supreme Court of the U. S. say, "The statute of limitations, instead of being viewed in an unfavourable light, as an unjust and discreditable defence, should have received such support from Courts of Justice, as would have made it what it was intended, em-

ing due. *Lawrence v. Worrall, Peake*, 93. In an action on a promissory note the following acknowledgment was held sufficient, the defendant not showing that there were other matters beside the promissory note to which the acknowledgment could refer. "Business calls me, to L. Should I be fortunate in my adventures you may depend on seeing me in B. in less than three weeks, otherwise I must arrange matters with you as circumstances will permit." *Frost v. Bengough*, 1 *Bingh.* 266.* See also *Colledge v. Horn*, 3 *Bingh.* 119.* So, "I will not pay; there are none paid; and I do not mean to pay unless obliged; you may go and try." *Douthwaite v. Tebbutt*, 5 *M. and S.* 75. See 4 *D. and R.* 179.* See also *Fearn v. Lewes*, 6 *Bingh.* 349,* *ante*, p. 257. An acknowledgment after action brought is sufficient. *Yea v. Fouraker*, 2 *Burr.* 1099.

Acknowledgment—what not sufficient.] Where, in answer to a letter from the plaintiff's attorney, the defendant wrote, "Sir, as soon as I am able to attend to my concerns, I shall wait on Capt. C. (the plaintiff,) whom I shall be able to satisfy respecting the misunderstanding which has occurred between us," *Gibbs, C. J.*, thought it not sufficient to take the case out of the statute. *Craig v. Cox, Holt*, 380.* So where in answer to a demand for charges relative to the grant of an annuity, the defendant said, "He thought it had been settled at the time the annuity was granted; that he had been in so much trouble since, that he could not recollect any thing about it." *Hellings v. Shaw*, 1 *B. Moore*, 340, 7 *Taunt.* 611,* *S. C.* So where the defendant, having denied the existence of the debt, said, on being requested to look at documents in proof of it, "It is no use for me to look at them, for I have no money to pay it now." *Snook v. Mears*, 5 *Price*, 636. So where the defendant referred the plaintiff to his attorney, "who was in possession of his determination and ability." *Bicknell v. Keppell*, 1 *N. R.* 20. Where the acknowledgment was, "I cannot afford to pay my new debts, much less my old ones," and the jury negatived the acknowledgment, the court refused a new trial. *Knott v. Farren*, 4 *D. and R.* 179.* So, "I will see my attorney, and tell him to do what is right." *Miller v. Caldwell*, 3 *D. and R.* 287.* So where the defendant on being arrested said, "I know that I owe the money but the bill I gave was on a three-penny receipt stamp, and I will never pay it;" the acknowledgment was held insufficient. *A'Court v. Cross*, 3 *Bingh.* 329.* Where the expressions of

* 8 Eng. Com. Law Reps. 317. * 11 Id. 59. * 16 Id. 191. * 19 Id. 98.

* 3 Id. 134. * 2 Id. 236. * 16 Id. 191. * 16 Id. 168. * 11 Id. 124.

phatically to be, a statute of repose. It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt, from lapse of time; but to afford security against state demands, after the true state of the transaction may have been forgotten, or be incapable of explanation, by reason of the death or removal of witnesses."

If the bar of the statute is sought to be removed by the proof of a new promise, that promise, as a new cause of action, ought to be proved in a clear and explicit manner, and be in its terms unequivocal and determinate; and if any conditions are annexed, they ought to be shown to be performed.

the defendant are ambiguous, it is a question of fact for the jury whether they amount to an acknowledgment of the debt. *Lloyd v. Maund*, 2 T. R. 760.

Acknowledgment—when accompanied with denial of liability.] Where the defendant acknowledges the debt, but insists at the same time that the statute bars it, such acknowledgment has been held in several cases to take the case out of the statute. *Bryan v. Horseman*, 4 East, 599. *Rucker v. Hannay*, Id. 604 (n). *Clarke v. Bradshaw*, 3 Esp. 157, *Leaper v. Tatton*, 16 East, 420; but see *Rowcroft v. Lomas*, 4 M. and S. 457, *Coltman v. Marsh*, 3 Taunt. 380.

Where the defendant acknowledges the debt, but insists that it is paid or discharged, the whole of his admission must, as it seems, be taken together, *vide ante*, p. 34, and the case will not be taken out of the statute. Thus, where the defendant said, "I have paid the debt, and will send you a copy of the receipt," but such copy was never sent, Lord Ellenborough held the acknowledgment insufficient. *Birk v. Guy*, 4 Esp. 184. But in another case where the acknowledgment was, "that he would satisfy the plaintiff, for he could show his receipt," it was held that the defendant was bound to produce a receipt, and that it was at all events a sufficient acknowledgment to go to a jury, upon his failing to produce a receipt. *Anon. cited Holt*, 381.*

So where the acknowledgment was, "You owe me more money, I have a set-off against it," it was held (Best, J., *diss.*) not to take the case out of the statute. *Swan v. Sowell*, 2 B. and A. 759. So where on application for the amount of a bill the defendant said, "that there had been such a bill, but that the plaintiff and his deceased partner had received the money, and that there was a balance due to him (the defendant) from the executors of the deceased," the acknowledgment was held not to be sufficient, and it was doubted whether the plaintiff could go into evidence of the account between the deceased partner and the defendant to falsify what the latter said. *Beale v. Nind*, 4 B. and A. 568.^a It seems, however, that where the defendant, in his acknowledgment, rests his discharge upon a written instrument to which he refers with precision, evidence of that instrument may be given to show that it does not operate as a legal discharge. *Partington v. Bucher*, 6 Esp. 66. *Helings v. Shaw*, 1 B. Moore, 344.^c *Beale v. Nind*, 4 B. and A. 572.^b See also *De la Torre v. Salkeld*, 1 Stark. 7.^d *Easterby v. Pullen*, 3 Stark. 186.^e Where the acknowledgment was, "I acknowledge the receipt of the money, but the testatrix gave it me," it was held not sufficient to take the case out of the statute.* *Owen v. Woolley*, B. N. P. 148.

^a 3 Eng. Com. Law Reps. 134. ^b 6 Id. 517. ^c 2 Id. 236. ^d 2 Id. 270.
^e 14 Id. 176.

* The acknowledgment must be an unqualified one of a present existing debt, to raise a valid promise to pay; and if it be qualified in a way to repel the presumption of a promise to pay, it is not evidence of a promise. *Eckert v. Wilson*, 12 Serg. & Rawls, 597; see also 1 Penn. Rep. 137, 138.

Acknowledgment—conditional.] Where the acknowledgment is conditional it has been held that the plaintiff must show the condition performed; thus where the defendant promised to pay the debt when he was able, Lord Kenyon ruled that the plaintiff was bound to show that the defendant was then of sufficient ability to pay, adding, that it had been so ruled before by Eyre, C. J. *Davies v. Smith*, 4 *Esp.* 35; and see *Besford v. Saunders*, 2 *H. Bl.* 116. So where the promise was, "I cannot pay the debt at present, but I will pay it as soon as I can," the Court of King's Bench held that it was necessary for the plaintiff to show the defendant's ability to pay. *Tanner v. Smart*, 6 *B. and C.* 603.[†] *Ayton v. Bolt*, 4 *Bingh.* 105.* *A Court v. Cross*, 3 *Bingh.* 329. But where the defendant said, that if certain other persons paid he should do the same, Lord Ellenborough held that the plaintiff was entitled to recover without proof that the other persons had paid. *Loweth v. Fothergill*, 4 *Campb.* 185. So where the defendant promised to pay the debt by instalments if time were given, Lord Ellenborough was of opinion that this was sufficient, and the plaintiff recovered without proof of time being given. *Thompson v. Osborne*, 2 *Stark.* 98.[‡] See also *Campbell v. Sewell*, 1 *Chitty*, 600.[§] *Fleming v. Hayne*, 1 *Stark.* 370.[¶]

Mutual accounts.] Such accounts as concern the trade of merchandise between merchant and merchant are excepted from the operation of the statute. Where there have been mutual current and unsettled accounts between the parties, and any of the items are within six years, such items are evidence (under the replication that the defendant did promise, &c.) as an admission of there being an open account, so as to take the case out of the statute, like any other acknowledgment. *Catling v. Skoulding*, 6 *T. R.* 189, 2 *Saund.* 227, a (n). But where all the items are on one side, the statute is a bar to all demands above six years standing. *Cotes v. Harris*, *B. N. P.* 149. Where there are mutual accounts, but no item of account at all within six years, the plaintiff may reply specially to the plea of the statute, that the accounts are merchants' accounts. 2 *Saund.* 127, c (n). But it has been held in equity that merchants' accounts are within the statute, if they have ceased six years. *Barber v. Barber*, 18 *Ves.* 286; and see *Jones v. Pengree*, 6 *Ves.* 580, *Martin v. Heathcote*, 2 *Eden*, 169. The clause in the statute as to merchants' accounts is not confined to persons actually merchants. *Catling v. Skoulding*, 6 *T. R.* 191.

Tender.

A plea of tender operates like the payment of money into court as an admission of the contract stated in the declaration. *Cox v. Brain*, 3 *Taunt.* 95. Thus in an action on a guarantee it super-

[†]13 Eng. Com. Law Reps. 273. [‡]13 Id. 361. [§]3 Id. 264. [¶]18 Id. 175.

*2 Id. 431.

sedes the necessity of proving it to be in writing. *Middleton v. Brewer, Peake*, 15.

By whom a tender must be made.] The tender need not be made by the debtor himself, it is sufficient if made by his agent; and a tender by an agent, at his own risk, of more than the money given by his principal, is good. *Read v. Goldring*, 2 M. and S. 86.

To whom a tender must be made.] A tender to a person authorised by the creditor to receive money for him, is sufficient. *Goodland v. Bleweth*, 1 Campb. 477. And where a clerk who was in the ordinary habit of receiving money for his master, was directed by his master not to receive the sum in question, for that he had put it into the hands of his attorney, and the clerk, on tender made, refused to receive the money, assigning the reason, it was held to be a good tender to the principal. *Moffat v. Parsons*, 5 Taunt. 307.¹ A tender to the attorney on the record is a good tender to the principal. *Crozer v. Pilling*,² 4 B. and C. ante, p. 247. And a tender to a person in the office of the plaintiff's attorney, who is referred to on the subject by a clerk in the office, and who refuses the tender as being of an insufficient sum, is a good tender without showing who that person was. *Wilmott v. Smith*, 1 M. and M. 238, 3 C. and P. 453,³ S. C.; and see *Barrett v. Dure*, *Id.* 200, ante, p. 248. Where the money was brought to the house of the plaintiff, and delivered to his servant, who retired, and appeared to go to the master, it was held to be evidence to go to the jury, from which they might infer that a tender was made. *Anon.* 1 Esp. 349. A tender to one of several partners is sufficient. *Douglas v. Patrick*, 3 T. R. 683. But a tender of a debt due to a bankrupt's estate to a collector employed by the solicitor under the commission is, as it seems, bad. *Blow v. Russel*, 1 C. and P. 365.⁴

Tender, to what amount.] If a man tenders more than he ought to pay, it is good, for the other ought to accept so much as is due to him. *Wade's case*, 5 Rep. 115, c. *Astley v. Reynolds*, 2 Str. 916. But it seems that such a tender is only good where it is made in monies numbered, so that the creditor may take what is due to him. Therefore a tender of a 5*l.* note, from which the creditor is desired to take 3*l.* 10*s.*, is not good. *Betterbee v. Davis*, 3 Campb. 70. *Robinson v. Cook*, 6 Taunt. 336. *Watkins v. Robb*, 2 Esp. 710. *Brady v. Jones*, 2 D. and R. 305.⁵ So where a party has several demands for unequal sums against several persons, a tender of one sum for the debts of all, is not a good tender of one of the debts. *Strong v. Harvey*, 3 Bingh. 304.⁶ But where a greater sum is tendered than the sum pleaded, and the creditor refuses to receive it on the ground that the amount is not sufficient, and not on account of the form of the tender, the tender is, it seems, good. *Black v.*

¹ 1 Eng. Com. Law Reps. 114. ² 10 Id. 271. ³ 14 Id. 336. ⁴ 11 Id. 421.
⁵ 16 Id. 87. ⁶ 11 Id. 112.

Smith, Peake, 88. *Saunders v. Graham, Gao*, 121.* A tender to one of several partners, including a debt due to the partnership, and also a debt due to that one partner individually, is a good tender of the partnership debt, unless objected to on account of the form of the tender. *Douglas v. Patrick*, 3 T. R., 683, and see *Black v. Smith, Peake*, 88.

Tender, in what kind of money.] By stat. 56 Geo. III. c. 68, s. 11, the gold coin of the realm is declared to be the only legal tender for payments (except as thereafter provided) within the United Kingdom of Great Britain and Ireland. And by s. 12, no tender of payment of money made in the silver coin of the realm of any sum exceeding the sum of 40s. at one time shall be a legal tender. Bank notes are not a legal tender. *Grigby v. Oates*, 2 B. and P. 526. But they have been held to be a good tender unless objected to at the time on that account. *Per Buller J., Wright v. Reed*, 3 T. R. 524, *Brown v. Saul*, 4 Esp. 267. So a tender of a country bank bill of exchange has been held good unless objected to. *Lockyer v. Jones, Peake*, 180 (n); but see *Mills v. Stafford. Ibid. contra.*

Tender, whether the money must be actually produced.] The actual production of the money due in monies numbered is not necessary, if the debtor having it ready to produce, and offering to pay it, the creditor dispense with the production of it at the time, or do any thing which is equivalent to that. *Per Lord Ellenborough, Thomas v. Evans*, 10 East, 101. Thus where the defendant left 10*l.* with his clerk, for the plaintiff, of which the clerk informed the plaintiff when he called and demanded a larger sum, and the plaintiff said he would not receive the 10*l.*, nor any thing less than his whole demand, but the clerk did not offer the 10*l.*, this was held to be no tender. *Ibid.* And see *Dickenson v. Shee*, 4 Esp. 68. But where the defendant went to the plaintiff and told him that he had eight guineas and a half in his pocket which he had brought for the purpose of satisfying his demand, but the plaintiff told him *he need not give himself the trouble of offering it*, for that he would not take it, the tender was held to be good. *Douglas v. Patrick*, 3 T. R. 684, and see *Ryder v. Townsend*, 7 D. and R. 119.* But it would have been otherwise, if, before the defendant could take the money out of his pocket, the plaintiff had left the room. *Leatherdale v. Sweepstone*, 3 C. and P. 342.* The agent of the defendant met the plaintiff in the street and told him that he was come to settle the business between the defendant and him, and that he was desired by the defendant to offer him 4*l.*; the plaintiff said he would not take it; the witness then said that he would give him the other 10*s.* out of his own pocket, and run the risk of being repaid. He then pulled out his pocket-book, and told the plaintiff that if he

would go into a neighbouring public-house he would pay him, but the plaintiff said *he would not take it*; this tender was held to be good. *Read v. Golding*, 2 M. and S. 86. Where a witness stated that she was present at an interview between the plaintiff and defendant, at which the defendant was willing to give the plaintiff 10*l.*; and that she (the witness) offered to go up stairs and fetch that sum, but that the plaintiff said *she need not trouble herself, for he could not take it*, this was held by Best, C. J., to be a good tender (the witness stating that the money was up stairs), though the defendant did not take any notice of the witness's offer at the time. *Harding v. Davies*, 2 C. and P. 77.* But where the defendant ordered A. to pay the plaintiff 7*l.* 12*s.*, and the clerk of the plaintiff's attorney demanded 8*l.*, on which A. said that he was only ordered to pay 7*l.* 12*s.* which sum was in the hands of B. who was present, and B. put his hand to his pocket as if to pull out his pocket book, when A. desired him not to do so, as the clerk demanded 8*l.* and he was ordered to pay 7*l.* 12*s.* only, and B. could not say whether he had the latter sum about him, but swore that he had it in his house, at the door of which he was standing, the tender was held to be insufficient. *Kraus v. Arnold*, 7 B. Moore 59,† and see *Glascott v. Day*, 5 Esp. 49.

Tender must be unconditional.] In order to support a plea of tender, there must be evidence of an unqualified offer. Therefore, where the defendant tendered a sum of money, and at the same time delivered a counterclaim upon the plaintiff, and the plaintiff did not take up the money or paper, but simply said, "You must go to my attorney," the tender was held insufficient. *Brady v. Jones*, 2 D. and R. 305.‡ So a tender accompanied with a protest against the party's liability, appears to be insufficient. *Simmons v. Wilmott*, 3 Esp. 94. So an offer of payment, clogged with a condition that it should be accepted as the balance due, does not amount to a legal tender. *Evans v. Judkins*, 4 Campb. 156; and see *Huxham v. Smith*, 2 Campb. 21, *Strong v. Harvey*, 3 Bingham 304.‡ So where the tender is accompanied with a demand of a receipt in full; *Glascott v. Day*, 5 Esp. 48, *Higham v. Baddesley*, Gow, 213. *Ryder v. Townsend*, 7 D. and R. 119;§ but though a party tendering money cannot in general demand a receipt for the money, yet where the creditor did not object to the demand of a receipt, but that the sum was insufficient, the tender was held by Lord Kenyon to be good. *Cole v. Blake*, Peake, 179. But where the defendant took the money out of his pocket, and said, "If you will give me a stamped receipt, I will pay you the money," and the plaintiff replied that he would not take it, but would serve him with a Marshalsea writ, Abbot, C. J., held this to be no proof

* 12 Eng. Com. Law Reps. 35. † 17 Id. 70. ‡ 16 Id. 87. § 11 Id. 112.
 ‡ 16 Id. 272.

of a tender. *Laing v. Meader*, 1 C. and P. 257.* The debtor ought to bring a receipt with him, and require the creditor to sign it, and if the latter refuses, he is liable to a penalty by 43 Geo. III. c. 126, s. 4, 5.

Tender, evidence on replication.] The plaintiff may reply that before tender made, he issued a writ. 1 *Saund.* 33, b (n). So he may reply a prior or subsequent demand and refusal. Such demand must be proved to be of the precise sum tendered. *Rivers v. Griffiths*, 5 B. and A. 630.* The demand must be by a person authorised to receive the money, and therefore a demand by the clerk of the plaintiff's attorney is insufficient. *Coore v. Callaway*, 1 *Esp.* 115. A subsequent demand upon one of two joint debtors is sufficient. *Peirse v. Bowles*, 1 *Stark.* 323.* A letter written by the plaintiff's attorney, and received by the defendant, demanding the sum tendered, is not, as it seems, sufficient evidence of a subsequent demand; for at the time of the demand, the defendant should have an opportunity of paying the sum demanded. *Edwards v. Yates, R. and M.* 360; but see *Haywood v. Hague*, 4 *Esp.* 93.

CASE FOR NUISANCE.

In an action on the case for a nuisance affecting real property, the plaintiff must prove his title to the property affected by the nuisance, the nuisance occasioned by the defendant, and the amount of damage.

Plaintiff's title.] It is sufficient for the plaintiff to prove, as alleged in the declaration, that he was *possessed* of the premises injured by the nuisance. The right to incorporeal hereditaments is frequently proved by presumptive evidence of enjoyment for upwards of twenty years, see *ante*, p. 16. Where it was alleged that by reason of his possession of a mill, the plaintiff was entitled to the use of a watercourse, it was held that such allegation was not supported by evidence of a parol license or agreement, by which the defendant permitted the exercise of the right in question to the plaintiff, but did not legally grant or annex it to the mill. *Fentiman v. Smith*, 4 *East*, 107; *Hewlins v. Shippam*, 5 B. and C. 221.* In an action against a stranger for disturbing the plaintiff in the possession of a pew, it is not necessary for the plaintiff to prove repairs, though it is otherwise where the action is against the ordinary. *Kenrick v. Taylor*, 1 *Wils.* 326. If the nuisance be of a permanent nature, and injurious to the reversion, an action may be brought by the reversioner as well as by the tenant in possession, each being entitled to recover his respective loss. *Biddlesford v. Onslow*, 3 *Lev.* 209, 1 *Saund.* 322, b. (n). So the reversioner may sue where the injury complained of is an injury to his right, though

* 11 Eng. Com. Law Repts. 382. * 7 Id. 215. * 2 Id. 409. * 11 Id. 207.

the nuisance is capable of being easily removed. *Shadwell v. Hutchinson*, 1 *M. and M.* 350. In an action by the reversioner the tenant is a competent witness to prove the injury. *Doddington v. Hudson*, 1 *Bingh.* 257.⁴ Where he held under a written agreement, the Court of Common Pleas were divided on the question, whether it was necessary that the agreement should be produced to prove the fact of the tenancy. *Strother v. Burr*, 5 *Bingh.* 136.⁵ But, in an action for an injury to the reversion in cutting down a tree, the tenant holding under a written agreement, the Court of King's Bench held that it was necessary to produce the agreement. *Cotterill v. Hobby*, 4 *B. and C.* 455,⁶ 1 *M. and R.* 444 (*n*).

The nuisance.] The plaintiff must prove an injury amounting in law to a nuisance. It is a nuisance to build a house overhanging the house of another, whereby the rain falls upon the latter house. *Baten's case*, 9 *Rep.* 53, *b*. So if a lessee overcharges his room with weight, whereby it falls into the cellar of the plaintiff beneath. *Edwards v. Holinder*, 2 *Leon.* 93. So the erection of anything offensive, as a swine-stye or lime-kiln, near the plaintiff's house, is a nuisance. *Aldred's case*, 9 *Rep.* 59, *a*. But for such things as merely abridge the gratification of the plaintiff in the enjoyment of his property, as shutting out the prospect from his windows, an action will not lie; *Id.* 58, *b*; and where the plaintiff brought his action against the defendant for keeping his dogs so near the plaintiff's house, that his family were prevented from sleeping during the night, and were much disturbed during the day, and the jury found a verdict for the defendant, though no evidence was given by him, the court refused to grant a new trial. *Street v. Tugwell*, *Selw. N. P.* 1047. Nor can an action be maintained for the reasonable use of a person's rights, though it be to the annoyance of another, as if a butcher, brewer, &c. use his trade in a convenient place. *Com. Dig. Action on the case for nuisance (C)*. See *R. v. Watts*, 1 *M. and M.* 281, *R. v. Cross*, 2 *C. and P.* 483.⁷ So an action for a nuisance to a house cannot be maintained for that which was no nuisance before a new window was opened by the plaintiff, and which becomes a nuisance only by that act. *Lawrence v. Obee*, 3 *Campb.* 514.

An action does not lie against a man for pulling down his house, whereby the adjoining house falls for want of shoring. *Peyton v. Mayor of London*, 9 *B. and C.* 725.⁸ But though the owner of the house injured neglects to shore it up, yet, if the defendant pulls down his house in a wasteful, negligent, and improvident manner, so as to occasion greater risk to the owner of the adjoining house than in the ordinary course of doing the work he would have incurred, the defendant is liable. *Walters v. Pfeil*, 1 *M. and M.* 365; and see *Mapey v. Goyder*, 4 *C. and P.* 161.⁹ *Brown v. Windsor*, 1 *Crom. and Jer.* 20.

⁴ 8 Eng. Com. Law Reps. 314. ⁵ 15 Id. 391. ⁶ 10 Id. 379. ⁷ 12 Id. 226.

⁸ 17 Id. 483. ⁹ 19 Id. 321.

It is no nuisance merely to prevent an excess in the plaintiff's use of his right, as if A. has lights in an ancient house, and rebuilds the house, and makes lights in other places and larger; *Com. Dig. Action on the case for nuisance (C)*; but if an ancient window is enlarged, the owner of the adjoining land cannot lawfully obstruct the passage of the light to any part of the space occupied by the ancient window, although a greater portion of light be admitted through the unobstructed part of the enlarged window than was formerly enjoyed. *Chandler v. Thompson*, 3 *Campb.* 80. A total privation of light is not necessary to maintain this action. If the plaintiff can prove that by reason of the obstruction, he cannot enjoy the light in so free and ample a manner as he did before the injury, it is sufficient. *Cotterell v. Griffiths*, 4 *Esp.* 69. *R. v. Neil*, 2 *C. and P.* 485;^{*} but see *Back v. Stacey*, 2 *C. and P.* 465.¹

A., the owner of two adjoining houses, granted a lease of one of them to B. He afterwards leased the other to C., there then existing in it certain windows. After this, B. accepted a new lease of his house from A. It was held that B. could not alter his tenement, so as to obstruct windows existing in C.'s house at the time of C.'s lease from A., though the windows were not twenty years old at the time of the alteration. *Coutts v. Gorham*, 1 *M. and M.* 396; and see *Compton v. Richards*, 1 *Price*, 27. *Riveere v. Bower*, *R. and M.* 24.

The nuisance, occasioned by the defendant.] This action may be brought either against the person who originally occasioned the nuisance, or against his alienee who permits it to be continued, but a request to the alienee to remove or abate the nuisance must be proved. *Penruddock's case*, 5 *Rep.* 101, a. Where a notice to remove the nuisance had been served upon the predecessor of the defendant, Abbott, C. J., ruled that, being delivered on the premises to the occupier for the time being, it bound a subsequent occupier. *Salmon v. Bensley*, *R. and M.* 189. Where a landlord employed workmen to repair a house in the possession of his tenant, who was bound to repair, and directed the repairs, he was held answerable for a nuisance occasioned by the negligence of his workmen. *Leslie v. Pounds*, 4 *Taunt.* 649, and see *post*. So in an action for obstructing the plaintiff's lights, a clerk who superintends the erection of the building by which they are darkened, and who alone directs the workmen, is liable to be joined as a co-defendant with the original contractor. *Wilson v. Peto*, 6 *B. Moore*, 47.² But an action on the case for not repairing fences can only be maintained against the occupier, and not against the owner of the fee not in possession. *Cheetham v. Hampson*, 4 *T. R.* 318. Unless the owner was bound to repair. *Payne v. Rogers*, 2 *H. B.* 349. See *Boyle v. Tamlyn*, 6 *B. and C.* 349.³ Where persons in the

^{*} 12 Eng. Com. Law Reps. 226. ¹ 12 Id. 218. ² 17 Id. 13. ³ 13 Id. 191.

exercise of a public duty, as commissioners of sewers or trustees of roads, do some act within their jurisdiction, which is in fact a nuisance to the property of another, yet no action lies; *Plate Glass Co. v. Meredith*, 4 T. R. 794, *Harris v. Baker*, 4 M. and S. 27, *Sutton v. Clarke*, 6 Taunt. 43,* *Boulton v. Crowther*, 2 B. and C. 798;† but if they act in an arbitrary and oppressive manner they are answerable; *Leader v. Mozon*, 3 Wils. 461, *Boulton v. Crowther*, 2 B. and C. 707;‡ and so if they exceed the authority intrusted to them; *Boulton v. Crowther*, 2 B. and C. 709, 710,* *Plate Glass Co. v. Meredith*, 4 T. R. 796; or act carelessly or negligently. *Jones v. Bird*, 5 B. and A. 857.¶ *Boulton v. Crowther*, 2 B. and C. 711.*

Defence.

The defendant may show under the general issue that the act complained of was done by the plaintiff's license; and if the defendant has expended money in consequence of having obtained the plaintiff's license, the latter cannot revoke the license without tendering the expenses to the defendant. *Winter v. Brockwell*, 8 East, 308.

If an ancient window has been completely shut up with brick and mortar above twenty years, it loses its privilege; *Lawrence v. Obee*, 3 Campb. 514; and where it appeared that the plaintiff's messuage was an ancient house, and that adjoining to it there had formerly been a building in which there was an ancient window next the lands of the defendant, and that the former owner of the plaintiff's premises, about seventeen years before, had pulled down this building, and had erected on its site another, with a blank wall next adjoining the premises of the defendant, and the latter, about three years before the commencement of the action, erected a building next the blank wall of the plaintiff, who opened a window in that wall in the same place where the ancient window had been in the old building, it was held that he could not maintain any action against the defendant for obstructing the new window, because by erecting the blank wall the owner not only ceased to enjoy the right, but had evinced an intention never to resume the enjoyment. *Moore v. Rawson*, 3 B. and C. 332.*

In actions on the case, in which the gist of the action is the consequential damage, the time of limitation begins to run from the time of the occurring of the consequential damage. *Roberts v. Read*, 16 East, 215; and see *Gillon v. Boddington, R. and M.* 161. *Howell v. Young*, 5 B. and C. 268.* Where a statute directed an action to be brought within six months after the matter or act done, and the injury was sinking a sewer, whereby the walls of the plaintiff's house cracked, it was held that the action must be brought

* 1 Eng. Com. Law Reps. 298.

† 9 Id. 227. ‡ 7 Id. 277. § 10 Id. 99.

• 11 Id. 219.

within six months from the time of the walls cracking. *Lloyd v. Wigney*, 6 Bingh. 489.¹

CASE FOR DISTURBANCE OF COMMON.

In an action on the case for disturbance of common, the plaintiff must prove his right of common, the disturbance by the defendant, and the damage.

Proof of right of common.] The plaintiff need not prove his title to the same extent as he has set it out in his declaration, for the disturbance is the gist of the action, and the title is only inducement. *B. N. P.* 75, 76, 1 *Saund.* 346, a (n). Thus if he states that he was possessed of a messuage, and so many acres of land, with the appurtenances, and by reason thereof ought to have common, &c., this allegation is divisible, and he may prove that he was possessed of the land only, and entitled to the common in respect of such land. *Ricketts v. Sawney*, 2 B. and A. 360. An allegation of right of common for all the plaintiff's cattle, levant and couchant, is supported in evidence, although the common is not sufficient to feed all the cattle for any length of time; *Willis v. Ward*, 2 Chitty, 297;² and an allegation of a right of common "for all commonable cattle, levant and couchant," is proved by a grant "of reasonable common of pasture." *Doidge v. Carpenter*, 6 M. and S. 47. An averment that the plaintiff was entitled to common of pasture for all his cattle, levant and couchant upon his land, is supported by evidence that the plaintiff was a part owner with the defendant and others, of a common field, upon which, after the corn was reaped, and the field cleared, the custom was for the different occupiers to turn out, in common, their cattle, the number being in proportion to the extent of their respective lands within the common field, although such cattle were not maintained upon such land during the winter, and although the custom proved was, to turn out according to the extent, and not to the produce of the land, in respect of which the right was claimed; and it was also held not to be necessary for the plaintiff to state his right to be with the exception of his own land, but that it was well laid to be over the whole common. *Cheesman v. Hardham*, 1 B. and A. 706. Where the plaintiff claimed a right of common for all his commonable cattle, and the proof was that he had turned on all the cattle he had kept, but that he never had kept any sheep, it was held that this was evidence of a right for all commonable cattle, to be left to the consideration of the jury. *Manifold v. Pennington*, 4 B. and C. 161.³

Hearsay is admissible to prove a customary right of common,

¹ 19 Eng. Com. Law Reps. 145. ² 18 Id. 341. ³ 10 Id. 301.

ante, p. 21 ; but whether it is admissible to prove a prescriptive right, strictly private, has been doubted. *Ibid.* A person who claims a customary right of common, is not competent to prove a right of common claimed under the same custom ; but it is otherwise where the issue does not affect any common right, but is merely on a right of common claimed by prescription, *ante*, p. 82.

The disturbance by the defendant.] This action is maintainable against another commoner, as well as against a stranger ; *Atkinson v. Teasdale*, 2 W. BL 817 ; and although the plaintiff himself has been guilty of a surcharge. *Hobson v. Todd*, 4 T. R. 71. But in an action against the lord, the plaintiff must allege a surcharge, and prove it, by showing that there is not a sufficiency of common left for him. *Smith v. Feverell*, 2 Mod. 6. 1 Saund. 346 b (n). Where the lord has licensed a third person to put cattle on the common, the plaintiff may declare against him as a stranger for a disturbance, generally ; *Ibid.* *Hobson v. Todd*, 4 T. R. 73 ; and it will, as it seems, lie upon the defendant to prove the license, and that he has not exceeded it, but has left a sufficiency of common for the plaintiff. 1 Saund. 346, b (new notes).

Damage.] In an action against a stranger, the smallest damage, as carrying away the dung from the common, is sufficient to maintain the action. *Pindar v. Wadsworth*, 2 East, 154. So in an action against another commoner for surcharging, it is sufficient to prove that the defendant put on the common more cattle than he had a right to do, without proving any specific damage. *Hobson v. Todd*, 4 T. R. 71.

Defence.

This being a possessory action, the defendant may show that the common has been enclosed and held in severalty, adversely, for upwards of twenty years, which is a bar to the entry of the commoner. *Hawke v. Bacon*, 2 Taunt. 156.

CASE FOR DISTURBANCE OF WAY.

In an action on the case for disturbance of way, the plaintiff must prove his right to the way as alleged in the declaration, and the disturbance by the defendant.

Right of way, how proved.] If the action is brought for a nuisance in a public highway, in which the plaintiff must show that he has sustained some particular damage, the plaintiff may prove the way to be public by evidence of common reputation. *Austin's case*, 1 Vent. 189. A way leading to any market-town,

and common for all travellers, and communicating with any great road, is a highway; but if it lead only to a church, or house, or village, or to the fields, it is a private way. *Per Hale, C. J., ibid.* As to dedication of way to the public, see *ante*, p. 17. In a very late case, where the public had used an unpaved and unfinished street for four or five years, the court held that the jury were warranted in presuming a dedication to the public. *Jarvis v. Dean*, 3 *Bingh.* 447.*

A private way may be claimed by grant, prescription, reservation, or as of necessity. An adverse user of a way for upwards of twenty years, will be evidence of a grant, *ante*, p. 16. The particular description of way, as a cart-way, horse-way, or foot-way, must be proved; and evidence of a prescriptive right of way for all manner of *carriages*, does not necessarily prove a right of way for all manner of *cattle*, though it is evidence to go to the jury. *Ballard v. Dyson*, 1 *Taunt.* 279. Where, in an indictment, a way was stated to be "for all the liege subjects, &c. to go, &c. with their horses, coaches, carts, and carriages," and the evidence was, that carts of a particular description, and loaded in a particular manner, could not pass along the way, it was held to be no variance. *R. v. Lyon, R. and M.* 151. The *termini* of the way, as stated in the declaration, must be proved, and a variance will be fatal. Thus the claim of a prescriptive right of way from A., over the defendant's close unto D., is not supported, if it appear that a close, called C., over which the way once led, and which adjoins to D., was formerly possessed by the owner of close A., and was by him conveyed in fee to another, without reserving the right of way, for thereby it appears that the prescriptive right of way does not, as claimed, extend *unto D.*, but stops short at C. *Wright v. Rattray*, 1 *East*, 377. The plaintiff might perhaps still have had a right of way *towards*, but certainly not *unto* the *terminus*, *Per Lord Kenyon, ibid.*; and where the defendant in trespass *quare clausum fregit* prescribed, in his plea for an occupation way from his own close "unto, through and over the said several closes, in which, &c. to and unto a certain highway, &c., and from thence back again unto the said close of the defendant," and it appeared at the trial that one of the several intervening closes was in the possession of the defendant himself, Lord Kenyon thought the prescription negatived, and the plaintiff had a verdict; but a new trial was granted by the Court of Common Pleas. *Jackson v. Shillito*, cited 1 *East*, 381. Where the way is claimed as a way of necessity, the plaintiff must prove the grant of the land to which the way leads to himself, and that he has no other way to the land, except the way in question, over the grantor's close. *Clark v. Cogge*, *Cro. Jac.* 170.

* 13 Eng. Com. Law Reps. 45.

Disturbance by the defendant.] The plaintiff must prove some disturbance by the defendant, and where the action is for a nuisance in a highway, he must show some special damage; for where the inconvenience is general only, and no particular damage has been sustained by any one individual, an action on the case cannot be supported; *Fineux v. Hovenden*, Cro. Eliz. 664; *Hubert v. Groves*, 1 Esp. 148; but it is sufficient to show that by the stopping of the highway, the plaintiff has been compelled to use a longer and more difficult way. *Com. Dig. action on the case for nuisance (C)*, *Greasly v. Codling*, 2 Bingh. 263.*

Defence.

The defendant may show that the way has been extinguished by an inclosure act, &c., or if the way is claimed by presumed grant, he may show that during the adverse user, the land was in the possession of a tenant, *ante*, p. 18. If the way is claimed as a way of necessity, he may show that the plaintiff can approach the place to which it leads over his own land, and that consequently the way of necessity has ceased. *Holmes v. Goring*, 2 Bingh. 76.† So he may show that the way was only a way by sufferance, during the pleasure of himself and the plaintiff, *see Reynolds v. Edwards, Willes*, 282, as evidence of which he may show that he has kept a gate, &c. across the road, or that the plaintiff has paid him a compensation for the use of the way.

CASE FOR NEGLIGENCE.

In an action on the case for negligence, the plaintiff must prove the defendant's liability, the negligence, and the damage sustained.

Defendant's liability, in case of negligent driving, &c.] In general where a servant is guilty of negligence in driving his master's carriage, the latter is answerable in an action on the case, and an allegation that the defendant negligently drove, &c. is supported by evidence that his servant was the driver; *Brucker v. Fromon*, 6 T. R. 659; but a master is not answerable for the wilful and malicious act of his servant; *McManus v. Cricket*, 1 East, 106; thus where the defendant's servant wantonly, and not for the purpose of executing his master's orders, strikes the plaintiff's horses, and thereby produces the accident, the master is not liable; but where in the course of his employment he so strikes, although injudiciously, his master is liable. *Croft v. Alison*, 4 B. and A. 590.‡ So even where the master of a ship was on board at the time when an injury was done to another ship by the wilful misconduct of a sailor, he was

* 9 Eng. Com. Law Reps. 407. † 9 Id. 324. ‡ 6 Id. 528.

held not to be liable. *Bowcher v. Noidstrom*, 1 Taunt. 568. Where A. and B. were jointly interested in the profits of a common stage waggon, but by a private agreement between themselves, each undertook the management of the waggon, with his driver and horses, for specified distances, it was held by Gibbs, C. J., that they were notwithstanding this private agreement, jointly responsible to third persons for the negligence of their drivers throughout the whole distance; and that an averment that the negligence was occasioned by the driver of A. (against whom alone the action was brought) was supported by proof that the driver was actually employed by B. in conducting the waggon for his own stages. *Waland v. Elkins*, 1 Stark. 272;^a see *Fromont v. Coupland*, 2 Bingh. 170.^b Where a stable-keeper let four horses to a person to draw his carriage to Epsom, and the horses were driven by the servant of the stable-keeper, Lord Ellenborough was of opinion that the latter was liable for any accidents occasioned by the post-boy's misconduct on the road; *Dean v. Branthwaite*, 5 Esp. 35; *Sammell v. Wright*, id. 263; *Sir H. Houghton's case*, coram Ld. Ellenb. cited 5 B. and C. 550.^c S. P.; and where the owner of a carriage hired of a stable-keeper a pair of horses to draw it for the day, and the owner of the horses provided a driver, who received no wages, but a gratuity from the owner of the carriage, and who was guilty of negligent driving, it was held by Abbott, C. J., and Littledale, J., that the owner of the carriage was not liable to be sued for such injury; *Bayley and Holroyd, J. J., diss. Loughter v. Pointer*, 5 B. and C. 547.^d Upon the same principle, where the owner of a carriage hired four post horses and two postilions of a livery-stable-keeper for the day, to take him from London to Epsom and back, and, in returning, the postilions damaged the carriage of a third person, it was held that such third person might sue the livery-stable-keeper for the damage. *Smith v. Lawrence*, 2 M. and R. 1; and see *Goodman v. Rennell*, 1 Moore and P. 241.^e In case for negligence against the proprietors of a stage-coach, where it appeared in evidence that one of the defendants was driving at the time when the accident happened, the jury having found that it happened through his negligent driving, it was held that the plaintiff might maintain case against all the proprietors, though he might perhaps have been entitled to sue the one who drove, in trespass. *Moreton v. Harden*, 4 B. and C. 223;^f and see post, "Trespass."

In an action for negligent driving, some negligence must be proved, and it is not sufficient merely to show an accident, unless it be of such a nature as to afford a presumption of negligence; thus proof that a stage-coach broke down, raises a presumption that the accident arose either from the unskilfulness of the driver, or the in-

^a 2 Eng. Com. Law Reps. 387. ^b 9 Id. 366. ^c 12 Id. 323. ^d 12 Id. 311.

^e 17 Id. 180. ^f 10 Id. 316.

sufficiency of the coach; *Christie v. Griggs*, 2 *Campb.* 79; and so where a coach which is overloaded breaks down, the excess in the number of passengers has been held to be conclusive evidence of the accident having arisen from overloading. *Israel v. Clark*, 4 *Esp.* 259. But where the injury is the result of mere accident, no action lies; thus where the coach-man was driving in the middle of the road, and not on his own side, but there were no other coaches on the road, and the horses took fright and overturned the coach, it was held to afford no evidence of negligence; *Aston v. Heaven*, 2 *Esp.* 532; and see *Wordsworth v. Willan*, 5 *Esp.* 273, where the rule with regard to keeping the road is said to be, that if a carriage coming in any direction leaves sufficient room for any other carriage, horse, or passenger, on its side of the way, it is sufficient. In *Wayde v. Lady Carr*, 9 *D. and R.* 256;^{*} the court said that whatever might be the law of the road, it was not to be considered as inflexible and imperative, since in the crowded streets of the metropolis, situations and circumstances might frequently arise where a deviation from what is called the law of the road would not only be justifiable but absolutely necessary. Where the defendant was driving on the wrong side of the road, which was of considerable breadth, and the plaintiff's servant, who was on horseback, without any reason, crossed over to the side on which the defendant was driving, and on endeavouring to pass his horse was killed. Lord Kenyon held that it was putting himself voluntarily into danger, and that the injury was of his own seeking; but the jury found a verdict for the plaintiff, which the Court of K. B. refused to disturb. *Cruden v. Fentham*, 3 *Esp.* 685. See also *Chaplin v. Hawes*, 3 *C. and P.* 554.[†] As to the rule for ships at sea, vide *Handasyde v. Wilson*, 3 *C. and P.* 528.[†] In order to subject the master to damages, it must appear that there has been something to blame on the part of his servant; and he is blameable if he has not exercised the best and soundest judgment on the subject; if he could have exercised a better judgment than he did, the owner is liable. *Per Lord Ellenb.*, *Jackson v. Tollett*, 2 *Stark.* 39.[‡] The coachman must have competent skill, and must use that skill with diligence; he must be well acquainted with the road he undertakes to drive; he must be provided with steady horses; a coach and harness of sufficient strength and properly made; and also with lights by night. *Per Best, C. J.*, *Crofts v. Waterhouse*, 3 *Bingh.* 321.[§] If the driver may adopt either of two courses, one of which is safe and the other hazardous, and he elects the latter, he is responsible for the mischief which ensues. *Mayhew v. Boyce*, 1 *Stark.* 423.[‡] If the driver of a stage-coach neglects to inform an outside passenger of his danger, where the way passes through a low arch-way, the owner of the coach is liable for the damage. *Dudley v. Smith*, 1 *Campb.* 167. If a passenger in consequence of the negligence of

^{*} 16 Eng. Com. Law Reps. 84. [†] 14 Id. 445. [‡] 14 Id. 429. [§] 3 Id. 234.

[†] 11 Id. 120. [‡] 2 Id. 454.

the defendant, is placed in such a situation as obliges him to adopt the alternative of leaping from the coach, or remaining at certain peril, and he leaps, and is hurt, the defendant is liable; but it must appear that the leaping was a prudent precaution for the purpose of self-preservation. *Jones v. Boyce*, 1 Stark. 493". The defendant's servant who drove the carriage is not a competent witness to disprove the negligence, *ante*, p. 82; and in an action of negligence for running against the plaintiff's cart with a dray, the plaintiff cannot call his servant, who drove the cart, without releasing him. *Miller v. Falconer*, 1 Campb. 251; *ante*, p. 82.

Defendant's liability, in case of damage by animals.] The owner of a wild and ferocious animal, as a lion, a bear, &c. which escapes and does damage, is liable, without any proof of notice of the animal's ferocity; but where the damage is done by a domestic animal, as a bull, a dog, &c. the plaintiff must show that the defendant knew that the animal was accustomed to do mischief; see *R. v. Huggins*, 2 *Ld. Raym.* 1583; *B. N. P.* 76; and if a man keeps a dog which is accustomed to bite sheep, &c., and the owner knows it, and notwithstanding keeps the dog still, and afterwards the dog bites a horse, this is actionable; *per Powell, J., Jenkins v. Turner*, 1 *Ld. Raym.* 110; and where the allegation in the declaration was, that the dog was accustomed to bite mankind, and that the defendant knew it, it was held by Abbott, J., that proof that the defendant had warned a person to beware of the dog lest he should be bitten, was evidence to go to the jury in support of the allegation; *Judge v. Cox*, 1 Stark. 285; see 1 *B. and A.* 623; though where it was alleged that the defendant knew that the dog was accustomed to bite sheep, the Court of King's Bench held that proof that the dog had jumped at a man, and had chased sheep, was not evidence to support the action. *Hartley v. Halliwell*, 2 Stark. 214, 1 *B. and A.* 620, *S. C.* So in an action for keeping a dog which bit the plaintiff, Lord Ellenborough held it not to be sufficient to show that the dog was of a fierce and savage disposition, and usually tied up by the defendant, and that the defendant had promised to make a pecuniary satisfaction to the plaintiff. *Beck v. Dyson*. 4 Campb. 198. It does not appear from the report of this case, whether there was an allegation that the dog was accustomed to bite mankind. See 2 Stark. 214 (n).^a Where a dog has once bit a man, and the owner having notice thereof, lets him go about, or lie at his door, an action will lie against him by a person who is bit; though it happened by such person treading on the dog's toes, for it was owing to the defendant not hanging the dog; *Smith v. Pelah*, 2 Str. 1264; so where the defendant's dog was reported to be mad, and the defendant tied him up, but he

^a 2 Eng. Com. Law Reps. 482. • 2 Id. 392. • 3 Id. 318. • 3 Id. 320.

broke loose and bit the plaintiff's child, who died of hydrophobia, it was held that the defendant was liable in damages to the amount of the apothecary's bill for attending the child; and Lord Kenyon admitted evidence of reports in the neighbourhood that the dog had been bitten by a mad dog, to prove the *scienter*; *Jones v. Perry*, 2 *Esp.* 482, differently reported *Peake Ev.* 292, 5th edit.; but if a dog, accustomed to bite, be let loose at night for the protection of the defendant's yard, and the injury arise from the plaintiff incautiously going into the yard, after it has been shut up, no action will lie. *Brock v. Copeland*, 1 *Esp.* 203. A person has a right to keep a fierce dog to protect his property, but not to place it in or on the approaches to his house, so as to injure persons exercising a lawful purpose in going along those paths to the house. *Per Tindal, C. J., Sarch v. Blackburn*, 1 *M. and M. MSS.* 4 *C. and P.* 297; *S. C.* See also *Blackman v. Simmons*, 3 *C. and P.* 138. The principle of these cases was discussed in *Bird v. Holbrook*, 4 *Bingh.* 628,* where it was held that a person who for the protection of his property sets a spring-gun without notice in a walled garden, is answerable in damages to a person, who, having climbed over the wall in search of a strayed fowl, is injured by the gun.

Defendant's liability for not enclosing cellars, &c.] Where the tenant of a house was bound to repair it, but the landlord superintended the repairs, and the cellar was left in a dangerous state and an accident happened, the landlord was held liable; *Leslie v. Pounds*, 4 *Taunt.* 649. *Payne v. Rogers*, 2 *H. Bl.* 349; so where the defendant had employed a bricklayer to make a sewer, who left it open, in consequence of which the plaintiff fell in and broke his leg, the defendant was held liable; *Sly v. Edgley*, 6 *Esp.* 6; see 5 *B. and C.* 559;† so the occupier of a house is bound to rail in the area, and if an accident happen, it is no defence that the premises had been in the same situation for many years before the defendant came into possession of them. *Coupland v. Hardingham*, 3 *Campb.* 398.

Where A. contracted with B. to repair his (A.'s) house for a stipulated sum; and B. contracted with C. to do the work; and C. with D. to furnish the materials, and the servant of D. brought a quantity of lime to the house, and placed it in the road, by which the plaintiff's carriage was overturned, it was held that A. was liable for this damage. *Bush v. Steinman*, 1 *B. and P.* 404; see 4 *M. and S.* 29; 5 *B. and C.* 580.† So where an incorporated water-works' company contracted with certain pipe-layers to lay down pipes, and the pipe-layers employed workmen, by whose negligence an accident happened, Lord Ellenborough held the company liable. *Matthews v. West London Water Works Co.*, 3 *Campb.* 403; and

see *Wild v. Gas Light Co.*, 1 Stark. 189 ;^a and *Henley v. Mayor of Lynn*, 5 Bingh. 91.^v

Defendant's liability—innkeeper.] The liability of an innkeeper, very closely resembles that of a carrier. He is *primâ facie* liable for any loss not occasioned by the act of God or the king's enemies, though he may be exonerated where the guest chooses to have the goods under his own care. *Per Bayley, J., Richmond v. Smith*, 8 B. and C. 11.^v Where a traveller desired to have his luggage taken into the commercial room, whence it was stolen, it was held that the innkeeper was liable though he proved that according to the usual practice of his house, the luggage would have been carried into the traveller's bed-room if no order had been given. *Ibid.* But where a traveller engaged a private room for the purpose of showing his goods, and was told that there was a key in the door, it was held that as he had taken the goods under his own custody, the innkeeper was not liable. *Burgess v. Clements*, 4 M. and S. 306.

Defence.

In an action against coach proprietors for negligence, the defendants may show that the damage was occasioned by mere accident ; see *supra* and *Crofts v. Waterhouse*, 3 Bingh. 321 ;^a *Lack v. Seward*, 4 C. and P. 106 ;^v and where the plaintiff rests his case on the presumption of negligence, arising from the fact of the coach breaking down, the defendant may show that the coach was examined a few days before the accident, and no flaw discovered ; and that the coachman, a skilful driver, was driving in the usual track and at a moderate pace. *Christie v. Griggs*, 2 Campb. 81. Where an injury arises from an obstruction in a highway, the defendant may show that the plaintiff by using common and ordinary caution might have avoided it. *Butterfield v. Forrester*, 11 East, 60. So the defendant may show that the immediate and proximate cause of the injury, was the unskilfulness or negligence of the plaintiff. *Flower v. Adam*, 2 Taunt. 315. See *Cruden v. Fentham*, 3 Esp. 685. *Lack v. Seward*, 4 C. and P. 106.^v So in an action for negligently keeping a mischievous animal, the defendant may show that the animal was properly at large, and that the accident happened by the plaintiff's own misconduct. *Brock v. Copeland*, 1 Esp. 203 ; see *Deane v. Clayton*, 1 B. Moore, 225 ;^a 245.

CASE AGAINST CARRIERS.

In an action on the case against a carrier for not carrying goods safely, the plaintiff must prove the defendant's character of car-

^a 2 Eng. Com. Law Reps. 350. ^v 15 Id. 376. ^v 15 Id. 145. ^v 11 Id. 119.
^v 19 Id. 298. ^a 2 Id. 183.

rier; the delivery of the plaintiff's goods to him; that the goods were not carried safely; and the damage.

The defendant's character as carrier.] The proprietors of stage coaches carrying goods; the owners and masters of vessels; *Morse v. Slue*, 2 Lev. 69; hoymen, *ibid.* *Wardell v. Mourelyan*, 2 Esp. 693; *Maving v. Todd*, 1 Stark. 92;* wharfingers and bargemen, *Rich. v. Kneeland*, Cro. Jac. 330, are liable as common carriers. A carrier is in the nature of an insurer, and liable for every accident except by the act of God or the king's enemies. *Per Lord Mansfield, Forward v. Pittard*, 1 T. R. 33. He is, therefore, liable for accidental fire. *Ibid.* Where a private person undertakes the carriage of goods he is liable, not as a common carrier, but according to the terms of his contract. *Coggs v. Bernard*, 2 Ld. Raym. 909. If a man travel in a stagecoach and take his portmanteau with him, though he has his eye on the portmanteau, yet the carrier is not absolved from his responsibility; but will be liable if the portmanteau be lost. *Per Chambre, J., Robinson v. Dunmore*, 2 B. and P. 419, see *Middleton v. Fowler*, 2 Salk. 282. Where the only proof of the defendant being a carrier from London was, that he kept a booking-office, and that on a board at the door were painted the words, "Conveyances to all parts of the world," Lord Tenterden was of opinion, that this was not sufficient, there being in London booking-offices not belonging to carriers. *Upston v. Stark*, 2 C. and P. 598.^b

Where the contract is expressly made with the plaintiff, he need not prove that the goods are his property; but where the action is brought on the implied contract with the owner of the goods to carry them safely, the plaintiff must prove that he is owner, of which the bill of lading, if there be one, will be evidence. *Ante*, p. 179, *Brown v. Hodgson*, 2 Campb. 36, *Daves v. Peck*, 8 T. R. 330.

Evidence of the contract.] Where, in order to prove the contract, the carrier's receipt for the goods is offered in evidence, it does not require a stamp, if the carriage does not exceed 20l. though the value of the goods is above that sum. *Latham v. Rutley, R. and M.* 13.

The *termini* of the journey must be proved as laid. *Turner v. Cracklin*, 2 Stark. 385.^c But where it was averred that the plaintiff delivered to the defendant a trunk to be put into a coach at Chester, to wit, at, &c. and safely carried to Shrewsbury, and it appeared in evidence that the trunk was delivered to the defendant at the city of Chester, which is a county of itself, separate from the county of Chester at large, but within its ambit, it was held that this was not a material variance. *Woodward v. Booth*, 7 B. and C. 301.^d

* 2 Eng. Com. Law Reps. 301. ^b 12 Id. 230. ^c 3 Id. 394. ^d 14 Id. 48.

Delivery to defendant.] In an action against the proprietor of a stage-coach for the loss of a parcel, it is sufficient to prove a delivery of the parcel to the driver. *Williams v. Causton*, 2 Stark. 82.* Unless it appear that the delivery was not in the ordinary course of business, but to the driver to carry for his own gain. *Butler v. Basing*, 2 C. and P. 613.† A delivery of goods on board ship must be to some officer accredited for that purpose, as to the mate. *Cobban v. Downe*, 5 Esp. 43. If the master receive goods at the quay or beach, or send his boat for them, the owner's responsibility commences with the receipt. *Abbott on ship*, citing *Molloy*, b. 2, c. 2, s. 2. *Fragano v. Long*, 4 B. and C. 219.‡ Where the only proof of delivery was, that the goods were left at an inn-yard, where the defendant and other carriers put up, it was held to be insufficient. *Sehcray v. Holloway*, 1 Ld. Raym. 46. So leaving goods at a wharf, piled up amongst other goods, without communication with any one there, is not a delivery to the wharfinger. *Buckman v. Levi*, 3 Campb. 414.

Proof of the loss.] It is incumbent on the plaintiff to give some evidence of negligence. *Marsh v. Horne*, 5 B. and C. 327.‡ Slight evidence of the loss will be sufficient in the absence of all proof on the part of the defendant. Thus where the plaintiff's shopman was called, who stated that he did not know of the delivery, and that the parcel could not have been delivered without his knowledge, Bullock, B., held this sufficient to call on the defendants to prove a delivery. *Griffiths v. Lee*, 1 Carr. and P. 110.‡ But where the defendant has restricted his liability, by means of a notice, it may be necessary to prove gross negligence or misfeasance in the defendant.

Defence.

The defendant may show that the goods did in fact arrive safe, but whether he must prove a delivery at the residence of the plaintiff, seems to depend on the circumstances of each particular case. It appears that in the absence of any express contract or usage, carriers are bound to deliver the goods at the house of the consignee. *Hyde v. Trent and Mersey Navigation Co.* 5 T. R. 389, *Starr v. Crowley*, 1 M. C. and Y. 129, *Duff v. Budd*, 3 B. and B. 182.‡ And if it be the carriers' course of trade to deliver goods at the consignee's residence, they are clearly bound to do so. *Golden v. Manning*, 2 W. Bl. 916. If the carrier delivers the goods to a wrong person, he is liable in trover. *Ross v. Johnson*, 5 Burr. 2825. *Stephenson v. Hart*, 4 Bingh. 483,‡ post.

Proof of notice restricting liability.] The most usual defence in this action is, that the defendant has restricted his liability by a notice to that effect. In order to affect the plaintiff with such no-

* 3 Eng. Com. Law Reps. 256. † 12 Id. 287. ‡ 10 Id. 313. § 11 Id. 242.
 ¶ 11 Id. 333. † 7 Id. 399. ‡ 15 Id. 47.

tice, the defendant may show that the notice was affixed in a conspicuous situation in the office to which the goods were brought by the plaintiff or his servant, *Leeson v. Holt*, 1 Stark. 186,^a provided the servant can read. *Davis v. Willan*, 2 Stark. 279.^a And if the servant who carried the goods to the office did not in fact read the notice, it will be no evidence of the notice. *Kerr v. Willan*, 2 Stark. 53,^a and see *Brooke v. Pickworth*, 4 Bingh. 222.^a So notice may be conveyed by handbills or advertisements in newspapers, but a carrier who circulates handbills, wherein he refuses to be accountable for parcels beyond a certain value, must be taken to have expressed in such handbills all the terms of the special contract whereon he receives goods, and cannot further restrict his liability by a board in his office. *Cobden v. Bolton*, 2 Campb. 108. And where two notices have been given, the carrier is bound by that which is least beneficial to himself. *Munn v. Baker*, 2 Stark. 255.^a A notice stuck up at the carrier's office is not sufficient to discharge him from his common law liability, where the goods have been delivered to his carter, not at the office. *Clayton v. Hunt*, 3 Campb. 27. The notice in the office ought to be in such large characters that no person delivering goods there can fail to read it, without gross negligence. *Per Cur. ibid.* And therefore where a handbill on the office-door stated in large characters the advantages belonging to the waggon, and in a very small character at the bottom the restrictive notice, Lord Ellenborough held it not enough to limit the defendant's liability. *Builer v. Heane*, 2 Campb. 415.

In order to prove that the plaintiff was acquainted with the notice, it has been customary to show that he was in the habit of reading the newspaper in which it was inserted. *Leeson v. Holt*, 1 Stark. 186.^a But it is not sufficient to prove that the notice was inserted in a paper which circulates in the place in which the party lives; some proof must be given that he took in the newspaper in question. *Proprietors of Norwich Navigation v. Theobald 1 M. and M.* and see *Boydell v. Drummond*, 11 East, 144 (n). Where the advertisement had been inserted in the Gazette, but there was no proof that the plaintiff read the Gazette, Lord Ellenborough in one case said he would receive the evidence, but that unless it were proved that the party were in the habit of reading the Gazette, it would be of little avail. *Ibid.* However, in a subsequent case the same judge was of opinion that this evidence could not be received without proof of the plaintiff's having read the Gazette, since he might be expected to look into the Gazette for notices of dissolution of partnership, but not for notices by carriers. *Munn v. Baker*, 2 Stark. 255.^a In a very late case where it was proved that the plaintiff had taken in for three years a weekly newspaper in which the defendant's restrictive notice had been always advertised, and the jury notwithstanding found a verdict for

^a 2 Eng. Com. Law Reps. 349. ^a 3 Id. 346. ^a 3 Id. 241. ^a 13 Id. 404.
^a 3 Id. 339.

the plaintiff, the Court of Common Pleas thought the verdict perfectly right, and that it could not be intended that a party read all the contents of any newspaper he might chance to take in. They said that carriers who wished by means of notice to divest themselves of a common law responsibility, were bound to fix upon their employers a knowledge of such notice, and that they might easily do so by delivering to every person who brought a parcel for conveyance a printed paper containing the notice, and a new trial was refused. *Rowley v. Horne*, 3 Bingham 2.^{*} So the defendant may bring home the notice to the plaintiff by showing that when other parcels were delivered to him a ticket was also delivered, containing the notice. *Mayhew v. Eames*, 3 B. and C. 603.^{*}

To prove the contents of a notice painted on a board inlaid in the wall, an examined copy is sufficient. *Cobden v. Bolton*, 2 Campbell 108.

It does not destroy the operation of a notice restraining the liability of the defendants to 5*l.* unless the goods be entered and paid for accordingly, that the goods were known to the carrier to be of greater value, and that the additional rate of carriage was not demanded by him; *Marsh v. Horne*, 5 B. and C. 322;^{*} *Levi v. Waterhouse*, 1 Price, 280; nor that on occasion of other losses the carrier made allowances to the plaintiff for damages, without inquiring into the cause of such damage. *Evans v. Soule*, 2 M. and S. 1. Though the notice will be inoperative in case the carrier has been guilty of negligence. *Garnett v. Willan*, 5 B. and A. 53;^{*} *Sleat v. Fagg*, 5 B. and A. 347;^{*} *Duff v. Budd*, 3 B. and B. 176.^{*} But the plaintiff will not be allowed to complain of any negligent performance of the contract by the carrier where that negligence has been occasioned by the plaintiff's own act, as by his treating the parcel as a thing of no value. *Per Abbott, C. J.*, *Sleat v. Fagg*, 5 B. and A. 347;^{*} *Batson v. Donovan*, 4 B. and A. 21.^{*} Thus where the plaintiff sent a parcel of value by the defendant's coach, using an artifice to disguise [200 sovereigns enclosed in 6 lbs. of tea], and the parcel was stolen by the defendant's servants, it was held that the plaintiff could not recover. *Bradley v. Waterhouse*, 1 M. and M. 154.

[Stat. 1 Will. IV. c. 68.] Great alterations have been introduced with regard to the responsibility of carriers by the 1 Will. IV. c. 68 (commencing 23d July, 1830), reciting that whereas by reason of the frequent practice of bankers and others of sending by the public mails, stage coaches, waggons, vans, and other public conveyances by land for hire, parcels and packages containing money, bills, notes, jewellery, and other articles of great value in small compass, much valuable property is rendered liable to depredation,

^{*} 11 Eng. Com. Law Reps. 3. ^{*} 10 Id. 195. ^{*} 11 Id. 243.

^{*} 7 Id. 19. ^{*} 7 Id. 123. ^{*} 7 Id. 399. ^{*} 6 Id. 333.

and the responsibility of mail contractors, stage-coach proprietors, and common carriers for hire, is greatly increased: and whereas through the frequent omission by persons sending such parcels and packages to notify the value and nature of the contents thereof, so as to enable such mail contractors, stage-coach proprietors, and other common carriers, by due diligence, to protect themselves against losses arising from their legal responsibility, and the difficulty of fixing parties with knowledge of notices published by such mail contractors, stage-coach proprietors, and other common carriers, with the intent to limit such responsibility, they have become exposed to great and unavoidable risks, and have thereby sustained heavy losses.

Sec. 1. No mail contractor, stage-coach proprietor, or other common carrier by land for hire, shall be liable for the loss of or injury to any article or articles or property of the descriptions following; (that is to say), gold or silver coin of this realm or of any foreign state, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewellery, watches, clocks, or time-pieces of any description, trinkets, bills, notes of the governor and company of the banks of England, Scotland, and Ireland respectively, or of any other bank in Great Britain or Ireland, orders, notes, or securities for payment of money, English or foreign, stamps, maps, writings, title-deeds, paintings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials, furs, or lace, or any of them, contained in any parcel or package which shall have been delivered, either to be carried for hire or to accompany the person of any passenger in any mail or stage coach or other public conveyance, when the value of such article or articles or property aforesaid contained in such parcel or package shall exceed the sum of ten pounds, unless at the time of the delivery thereof at the office, warehouse, or receiving house of such mail contractor, stage-coach proprietor, or other common carrier, or to his, her, or their book-keeper, coachman, or other servant, for the purpose of being carried or of accompanying the person of any passenger as aforesaid, the value and nature of such article or articles or property shall have been declared by the person or persons sending or delivering the same, and such increased charge as hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package.

Sec. II. When any parcel or package containing any of the articles above specified shall be so delivered, and its value and contents declared as aforesaid, and such value shall exceed the sum of ten pounds, it shall be lawful for such mail contractors, stage-coach proprietors, and other common carriers to demand

and receive an increased rate of charge, to be notified by some notice affixed in legible character in some public and conspicuous part of the office, warehouse, or other receiving house where such parcels or packages are received by them for the purpose of conveyance, stating the increased rates of charge required to be paid over and above the ordinary rate of carriage as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles; and all persons sending or delivering parcels or packages containing such valuable articles as aforesaid at such office shall be bound by such notice, without further proof of the same having come to their knowledge.

Sec. III. Provided always, that when the value shall have been so declared, and the increased rate of charge paid, or an engagement to pay the same shall have been accepted as hereinbefore mentioned, the person receiving such increased rate of charge or accepting such agreement shall, if thereto required, sign a receipt for the package or parcel, acknowledging the same to have been insured, which receipt shall not be liable to any stamp duty; and if such receipt shall not be given when required, or such notice as aforesaid shall not have been affixed, the mail contractor, stage-coach proprietor, or other common carrier as aforesaid shall not have or be entitled to any benefit or advantage under this act, but shall be liable and responsible as at the common law, and be liable to refund the increased rate of charge.

Sec. IV. Provided always, that from and after the first day of September now next ensuing no public notice or declaration heretofore made or hereafter to be made shall be deemed or construed to limit or in anywise affect the liability at common law of any such mail contractors, stage-coach proprietors, or other public common carriers as aforesaid, for or in respect of any articles or goods to be carried and conveyed by them; but that all and every such mail contractors, stage-coach proprietors, and other common carriers as aforesaid, shall from and after the said first day of September be liable, as at the common law, to answer for the loss or any injury to any articles and goods in respect whereof they may not be entitled to the benefit of this act, any public notice or declaration by them made and given contrary thereto, or in anywise limiting such liability notwithstanding.

Sec. V. That for the purposes of this act every office, warehouse, or receiving house, which shall be used or appointed by any mail contractor or stage-coach proprietor or other such common carrier as aforesaid for the receiving of parcels to be conveyed as aforesaid, shall be deemed and taken to be the receiving house, warehouse, or office, of such mail contractor, stage-coach proprietor, or other common carrier; and that any one or more of such mail contractors, stage-coach proprietors, or common carriers, shall

be liable to be sued by his, her, or their name or names only; and that no action or suit commenced to recover damages for loss or injury to any parcel, package, or person, shall abate for the want of joining any co-proprietor or co-partner in such mail, stage-coach, or other public conveyance by land for hire as aforesaid.

Sec. VI. Provided always, that nothing in this act contained shall extend or be construed to annul or in anywise affect any special contract between such mail contractor, stage-coach proprietor, or common carrier, and any other parties, for the conveyance of goods and merchandises.

Sec. VII. Provided also, that where any parcel or package shall have been delivered at any such office, and the value and contents declared as aforesaid, and the increased rate of charges been paid, and such parcels or packages shall have been lost or damaged, the party entitled to recover damages in respect of such loss or damage shall also be entitled to recover back such increased charges so paid as aforesaid, in addition to the value of such parcel or package.

Sec. VIII. Provided also, that nothing in this act shall be deemed to protect any mail contractor, stage-coach proprietor, or other common carrier for hire, from liability to answer for loss or injury to any goods or articles whatsoever arising from the felonious acts of any coachman, guard, book-keeper, porter, or other servant in his or their employ, nor to protect any such coachman, guard, book-keeper, or other servant, from liability for any loss or injury occasioned by his or their own personal neglect or misconduct.

Sec. IX. Provided also, that such mail contractors, stage-coach proprietors, or other common carriers for hire, shall not be concluded as to the value of any such parcel or package by the value so declared as aforesaid, but that he or they shall in all cases be entitled to require, from the party suing in respect of any loss or injury, proof of the actual value of the contents by the ordinary legal evidence, and that the mail contractors, stage-coach proprietors, or other common carriers as aforesaid, shall be liable to such damages only as shall be so proved as aforesaid, not exceeding the declared value, together with the increased charges as before mentioned.

Sec. X. That in all actions to be brought against any such mail contractor, stage-coach proprietor, or other common carrier as aforesaid, for the loss of or injury to any goods delivered to be carried, whether the value of such goods shall have been declared or not, it shall be lawful for the defendant or defendants to pay money into court in the same manner and with the same effect as money may be paid into court in any other action.

CASE FOR DEFAMATION.

In an action on the case for slander or libel, the plaintiff must prove the speaking of the words or the publication of the libel, the innuendos, the introductory averments essential to his case, the malice of the defendant in certain cases, and the damage sustained.

Proof of the speaking of the words.] Though the plaintiff need not prove the speaking of all the words laid in the declaration, yet it is necessary to prove some material part of them, and it is not sufficient to prove equivalent words of slander. *Per Lawrence, J., Mailland v. Goldney*, 2 East, 434, ante, p. 47. Thus a statement of words spoken affirmatively is not supported by proof of words spoken by way of interrogation. *Barnes v. Holloway*, 8 T. R. 150. B. N. P. 5. Where the declaration avers that the defendant spoke certain words, it must be taken to mean that he used them as his own words, and if he repeated them as the words of another, it is a variance. *McPherson v. Daniels*, 10 B. and C. 274. *Bell v. Byrne*, 13 East, 554. Where the words laid were, "This is my umbrella, and he stole it from my back-door," and the words proved, "It is my umbrella, &c." it was held a variance, the word *this* importing that the umbrella was present (which in fact it was not). *Walters v. Mace*, 2 B. and A. 756. Where all the words constitute one charge, they must be all proved. Thus where the words laid were, "He is selling coals at one shilling a bushel to pocket the money, and become a bankrupt to cheat his creditors," and the words "and become a bankrupt" were not proved, Eyre, C. J., held that the words constituted one general charge, and that the variance was fatal. *Flower v. Pedley*, 2 Esp. 491. But where the words omitted to be proved do not qualify or affect those proved, the omission is immaterial. Thus, where the words stated were "'Ware Hawk; you must take care of yourself there; mind what you are about;" and the plaintiff failed to prove the words "Mind what you are about;" the variance was held immaterial. *Orpwood v. Barker*, 4 Bingham 261; see also *Rutherford v. Evans*, 6 Bingham 451.* Words laid as spoken in English are not proved by evidence of words spoken in a foreign language. *Zenobio v. Axtell*, 6 T. R. 162.

Proof of the libel.] A mere omission in setting out part of a libel is not fatal unless the sense of that which is set out is thereby varied. *Tabert v. Tipper*, 1 Campbell 353; see 5 B. and A. 617.* But where a libellous paragraph contained two references, by which the words appeared to be in fact the language of a third person, speaking of the plaintiff's conduct, and those references were omitted in the declaration, it was held that the omission alter-

* 13 Eng. Com. Law Reps. 424. * 10 Id. 128. * 7 Id. 211.

ed the sense of the passage, and that the variance was fatal. *Cartwright v. Wright*, 5 B. and A. 615; see *R. v. Solomon, R. and M.* 253. And where the words laid were, "My sarcastic friend, by leaving out the repetition, &c." and those proved were, "my sarcastic friend ΜΟΡΟΣ, by leaving out," &c., Lord Ellenborough held the variance fatal. *Tabart v. Tipper*, 1 Campb. 353. Where the omission or addition of a letter does not change the word so as to make it another word, the variance is not material. *Per Ld. Mansfield, Beech's case*, 1 Leach, 159, 3d ed. Thus "understood," for "understood," is no variance. *Ibid.* case of indictment for perjury.

Proof of publication of libel.] Proof that the libel produced is in the defendant's handwriting, is said to be presumptive evidence of publication, so as to throw the proof of non-publication upon him. *R. v. Beere*, 1 Ld. Raym. 417. *Lamb's case*, 9 Rep. 59, b. So printing a libel, unless qualified by circumstances, shall *prima facie* be understood to be a publishing, for it must be delivered to the compositor, and the other subordinate workmen. *Per Cur. Baldwin v. Elphinstone*, 2 W. B. 1088. A written libel may be published in a letter to a third person, *per Cur. ibid.*, but the publication of a libellous letter to the plaintiff himself, though it may be the object of an indictment, is not such a publication as to maintain an action. *Phillips v. Jansen*, 2 Esp. 614. But where the libel was contained in a letter sent by the defendant to the plaintiff, proof that the defendant knew that letters sent to the plaintiff were usually opened by his clerk, is evidence to go to a jury, of the defendant's intention that the letter should be read by a third person, so as to amount to a publication. *Delacroix v. Thevenot*, 2 Stark. 63. It was ruled by Lord Ellenborough, that where a person who has a copy of a libellous caricature, shows it to another at his request, it is not sufficient evidence of publication to support an action. *Smith v. Wood*, 3 Campb. 323, *sed quære*. The delivery of a libellous pamphlet by the governor of a colony to his attorney-general, not for any official purpose, is a publication. *Wyatt v. Gore, Holt*, 229. The sale of a libel in the defendant's shop by his servant or agent there, for the defendant's benefit, is a publication by the defendant, though he was not privy to the contents or sale. *Com. Dig. Libel* (B. 1). The delivery of a newspaper to the officer at the stamp office, is a sufficient publication to sustain an indictment for a libel in that paper. *R. v. Amphlett*, 4 B. and C. 35. So proof that the defendant accounted with the officer of stamps for the duty on advertisements in the paper in question is evidence of publication. *Cook v. Ward*, 6 Bingh. 408. Evidence that the libel was written by the defendant's daughter, who was authorised to make out his bills and write his general

• 7 Eng. Com. Law Reps. 210. • 3 Id. 245. • 3 Id. 111. • 10 Id. 275.
• 19 Id. 117.

letters of business, is not sufficient to charge the defendant, unless it can be shown that such libel was written with the knowledge or by the procurement of the defendant. *Harding v. Greening*, 1 B. Moore, 477.^a In order to show that the defendant had caused a printed libel to be inserted in a newspaper, a reporter to the paper was called, who proved that he had given a written statement to the editor of the newspaper, the contents of which had been communicated by the defendant for the purpose of such publication, and that the newspaper produced was exactly the same, with the exception of one or two slight alterations not affecting the sense; it was held that what the reporter published might be considered as published by the defendant, but that the newspaper could not be read in evidence, without producing the written account delivered by the witness to the editor. *Adams v. Kelly, R. and M.* 157. Where a letter (whether sealed or not there was no direct proof) was put into the post-office in the county of L., it was held by the Court of K. B. (*Bayley, J. dub.*) that it was a publication in L. *R. v. Burdett*, 4 B. and A. 95.^a *R. v. Watson*, 1 Campb. 215.

The proof of the publication of libels contained in newspapers is greatly facilitated by the stat. 35 Geo. III. c. 78, by which an affidavit or affirmation sworn by the proprietors and printers of every newspaper, or by a certain number of them, as therein directed, is to be delivered to the commissioners of the stamp duties, such affidavit to specify the names and abode of the printer, publisher, and proprietors, if they do not exceed two, exclusive of the printer and publisher, and if they do, then of two proprietors and their proportional shares, and the description of the printing-house, and the title of the paper; and by sec. 9, all such affidavits and affirmations or copies thereof, certified to be true copies, shall respectively, in all proceedings, civil and criminal, touching any newspaper, or other such paper as aforesaid, which shall be mentioned in any such affidavits or affirmations, or touching any publication, matter, or thing contained in any such newspaper, or other paper, be received and admitted as conclusive evidence of the truth of all such matters set forth in such affidavits or affirmations, as are by the said act required to be therein set forth, against every person who shall have signed, or sworn, or affirmed, such affidavits or affirmations, and shall also be received and admitted in like manner as sufficient evidence of the truth of all such matters against all and every person, who shall not have signed, or sworn, or affirmed the same, but who shall be therein mentioned to be a proprietor, printer, or publisher of such newspaper or other paper, unless the contrary shall be satisfactorily proved; provided always, that if any such person or persons respectively, against whom any such affidavit or affirmation, or any copy thereof shall be offered

^a 4 Eng. Com.-Law Reps. 13. ^b 6 Id. 368.

in evidence, shall prove that he, she, or they, hath or have signed, sworn, or affirmed, and delivered to the said commissioners, or such officer as aforesaid, previous to the day of the date, or publication of the newspaper, or other such paper as aforesaid, to which the proceedings, civil or criminal, shall relate, an affidavit or affirmation that he, she, or they hath or have ceased to be the printer or printers, proprietor or proprietors, or publisher or publishers of such newspaper, or other such paper as aforesaid, such person or persons shall not be deemed, by reason of any former affidavit or affirmation so delivered as aforesaid, to have been the printer or printers, proprietor or proprietors, or publisher or publishers of such paper, after the day on which such last-mentioned affidavit or affirmations shall have been delivered to the said commissioners, or their officer, as aforesaid. By sec. 11, it shall not be necessary after any such affidavit or affirmation, or a certified copy thereof, shall have been produced in evidence against the persons who signed the same, &c., or after a newspaper, or any such other paper as aforesaid, shall be produced in evidence, entitled in the same manner as the newspaper, or other paper mentioned in such affidavit or copy, is entitled, and wherein the name or names of the printer or publisher, or printers or publishers, and the place of printing, shall be the same as those mentioned in such affidavit or affirmation, for the plaintiff to prove that the newspaper, or paper, to which such trial relates, was purchased at any house, shop, or office, belonging to or occupied by the defendant or defendants, or any of them, or by his or their servants or workmen, or where he or they by themselves or their servants or workmen usually carry on the business of printing or publishing such paper, or where the same is usually sold. By sec. 14, in all cases, a copy of any such affidavit or affirmation, certified to be a true copy under the hand or hands of one or more of the commissioners or officers in whose possession the same shall be, shall upon proof made, that such certificates have been signed with the handwriting of the person or persons making the same, and whom it shall not be necessary to prove to be a commissioner or commissioners, or officer or officers, be received in evidence as sufficient proof of such affidavit or affirmation, and that the same was duly sworn or affirmed, and of the contents thereof; and such copies so produced and certified, shall also be received as evidence that the affidavit or affirmation, of which they purport to be copies, have been sworn or affirmed according to this act, and shall have the same effect for the purposes of evidence, to all intents whatsoever, as if the original affidavits or affirmations, of which copies so produced and certified shall purport to be copies, had been produced in evidence, and had been proved to have been duly so certified, sworn, or affirmed by the

person or persons appearing by such copy to have sworn or affirmed the same as aforesaid. By sec. 17, the printer or publisher of every newspaper, or other such paper as aforesaid, shall upon every day upon which the same shall be published, or within six days after, deliver to the commissioners of stamps at their head office, or to some officer to be appointed by them to receive the same, and whom they are hereby required to appoint for that purpose, one of the papers so published upon each such day, signed by the printer or publisher thereof, in his handwriting, with his name and place of abode; and in case any person or persons shall make application to the commissioners, or such officer as aforesaid, in order that such newspaper, or other paper, so signed by the printer or publisher, may be produced in evidence in any proceeding, civil or criminal, the said commissioners, or such officers, shall at the expense of the party applying, at any time within two years from the publication thereof, either cause the same to be produced in the court in which the same is required to be produced, and at the time when the same is required to be produced, or shall deliver the same to the party applying for it, taking, according to their discretion, reasonable security at his expense for the returning the same to the said commissioners, or such officer; and in case, by reason that the same shall have been previously required by any other person to be produced in any court, or hath been previously delivered to any other person for the like purpose, the same cannot be produced at the time required, or be delivered according to such application, in such case the said commissioners, or such their officer, shall cause the same to be produced, or shall deliver the same as soon as they are enabled so to do.

Since this statute the production of a certified copy of the affidavit and of a newspaper corresponding in the title and in the names and descriptions of printer and publisher, with the newspaper mentioned in the affidavit, will be sufficient evidence of publication. *Mayne v. Fletcher*, 9 B. and C. 382.¹ *R. v. Hunt*, 31 State Trials, 375. But where the affidavit and the newspaper vary in the place of residence of the party, it is insufficient. *Murray v. Souter*, cited 6 Bingh. 414.²

Proof of introductory averment.] All the introductory averments essential to the plaintiff's case must be proved, but if immaterial to the character of the libel itself, they need not be proved. Thus where the declaration stated that the plaintiff was an attorney, and had been employed as vestry clerk to the parish of A., and that whilst he was such vestry clerk certain prosecutions were carried on against B. for certain misdemeanors, and in furtherance of such proceedings, and to bring the same to a successful issue, certain sums of money belonging to the parishioners were appro-

¹ 17 Eng. Com. Law Reps. 401. ² 19 Id. 119.

priated and applied to the discharge of the expenses incurred on account of the said proceedings, yet defendant, &c., intending, &c., to injure the plaintiff in his profession of an attorney, and to cause him to be esteemed a fraudulent practiser in his said profession, and in his office as vestry clerk, and to cause it to be suspected that the plaintiff had fraudulently applied money belonging to the parishioners, falsely and maliciously published, of and concerning the plaintiff, and of and concerning his conduct in his office of vestry clerk, *and of and concerning the matters aforesaid*, the libel, &c., and it appeared on the production of the libel at the trial, that the imputation was that the plaintiff had applied the parish money in payment of the expenses of the prosecution *after* it had terminated, it was held that this was no variance, because it did not alter the character of the libel, the fraud imputed to the plaintiff being the same, whether the money was misapplied before or after the proceedings had terminated. *May v. Brown*, 3 B. and C. 113; *and per Abbott, C. J., ibid.* "The allegation does not compel the plaintiff to prove formally, and precisely, that the libel relates to every part and particular of the matter so previously stated, but it satisfies all he has taken upon himself to prove, if he shows that the libel relates substantially to the matters previously alleged by way of introduction, in such manner as that the defamation contained in the libel is of the character and effect which the plaintiff has described." So where the declaration stated that the plaintiff was an attorney, and that the defendant, intending to injure him in his good name, and in his said profession of an attorney, published the libel of and concerning the plaintiff, *and of and concerning him in his said profession*, and the plaintiff failed in proving, that at the time of the publication of the libel he was an attorney, it was held that this was not a fatal variance, the words of the libel being actionable, though not used with reference to the professional character of the plaintiff." *Lewis v. Walter*, 3 B. and C. 138ⁿ (n).

But where the fact stated in the introductory averment, and connected with the libel by the words, "of and concerning," is material to the defamatory character of the libel itself, it must be proved as stated; thus where the declaration stated in the first count, that the plaintiff, a constable, had apprehended persons stealing a dead body, and had carried the body to Surgeons' Hall, and that the defendant published the libel "of and concerning the plaintiff's said conduct;" and in the second count stated that defendant published a certain other libel "of and concerning the conduct of the plaintiff respecting the said dead body," it was held a variance upon both counts that the plaintiff did not prove that he had carried the body to Surgeons' Hall. *Teesdale v.*

¹ 10 Eng. Com. Law Reps. 24. = 10 Id. 36.

Clement, 1 *Chitty*, 603,* and *per Cur. ibid.* "The fact which has failed in proof is very material to the libel itself; for the libel is with respect to the plaintiff's conduct to this dead body, and if the plaintiff is charged with carrying this body, amongst other places, to Surgeons' Hall, it certainly is most important to prove that part of the conduct." So in an action for words charging the plaintiff with having stolen some soap, where the declaration alleged that the words had been spoken of and concerning certain soap which B. had asserted to have been *stolen* out of his yard, and it appeared in evidence that B. had asserted that the soap had been *taken* out of his yard, Abbott, C. J., held the variance fatal. *Shepherd v. Bliss*, 2 *Stark*. 510.* Where the declaration stated that the plaintiff was treasurer and collector of certain tolls, and that the defendant spoke of and concerning the plaintiff, as such treasurer and collector as aforesaid, certain words, "thereby meaning that the plaintiff, as such treasurer and collector had been guilty, &c.;" and the plaintiff failed to prove that he was collector, it was held that the plaintiff was bound to prove that he was both treasurer and collector; *Sellers v. Till*, 4 *B. and C.* 656,* and *per Cur.* "it appears that there is an inuendo expressly applying the words to the plaintiff in his character of collector, which makes the case very distinguishable from those which have been cited, (*May v. Brown*, *Lewis v. Walter*, *supra*,) for in them the meaning of the words was not limited by the insertion of such an inuendo."

Where the words are alleged to have been spoken of and concerning the plaintiff in a particular character, and are only actionable as having been spoken of the plaintiff in that character, such character must be proved; but where the words themselves admit the plaintiff's character, any further evidence of it is unnecessary. *See ante*, p. 27; and *Yrisarri v. Clement*, 3 *Bingh.* 432.* The first count of a declaration stated that the plaintiff had been a woolstapler at C. and a brewer at O., and that the defendant spoke of him *as such trader as aforesaid* the following words: "Mr. H. (the plaintiff) and Mr. B. have both been bankrupts; Mr. H. at C., &c." The second count alleged the words to have been spoken of and concerning the plaintiff *in his former trade of a woolstapler*; and the the third of and concerning the plaintiff *in his trade of a brewer*. There was no evidence of the plaintiff having been a woolstapler, but it was proved that he had been a brewer at Oxford. It was objected that the proof did not support the allegation, that the words were spoken of the plaintiff in his trade of a brewer at O.; the Court of K. B. held it no variance, and *Per Ld. Ellenborough*, the place where the bankrupt is stated to have become bankrupt is immaterial; he might have become bankrupt whilst a brewer at O., by an act of bankruptcy committed at C.;

* 18 Eng. Com. Law Reps. 173. • 3 Id. 453. • 10 Id. 434. • 13 Id. 36.

the substance of the words is this ; he was a bankrupt at C., and so he might be whilst carrying on the trade of a brewer at O. *Hall v. Smith*, 1 M. and S. 287. So where the declaration alleged that the plaintiff, at the time of the speaking of the words, was a carpenter and sworn appraiser ; and that the defendant, intending to injure him in his several trades as aforesaid, and to prevent persons from employing him in his several trades as aforesaid, in a certain discourse of and concerning the plaintiff in his *trade of carpenter*, spoke the words ; and there was no proof that the plaintiff carried on the trade of a sworn appraiser, it was held no variance. *Figgins v. Cogswell*, 3 M. and S. 369. See also *Rutherford v. Evans*, 6 Bingham 451.*

To prove that the plaintiff is a physician, it is not sufficient to produce a diploma of Doctor of Physic, under the seal of one of the Universities, without proving the seal. *Moises v. Thornton*, 8 T. R. 303. To make such an instrument evidence, it should be either the original act of the corporation conferring the degree, or an examined copy of it ; as an original act, it should be proved that the seal affixed to it is the seal of the University ; if considered as a copy, it should be compared with the original book by the witness who produced it. *Per Grose, J., ibid., see ante, p. 44* ; and as to proof of being an *apothecary*, *ante, p. 201*. The books of an University conferring the degree of Doctor of Laws, are evidence to prove that fact. 8 T. R. 306.

In order to prove that the plaintiff is an attorney, an examined copy of the roll of attorneys, signed by the plaintiff, is sufficient. So the book from the master's office containing the names of all the attorneys, produced by the officer in whose custody it is kept, is good evidence, together with proof that the plaintiff practised as an attorney at the time of the words spoken. *R. v. Crossley*, 2 Esp. 526. *Lewis v. Walter*, 3 B. and C. 138.* *Jones v. Stevens*, 11 Price, 251. Where the title to the particular situation is not the subject of any express documentary appointment, the acting in the situation is of course the only evidence which the fact admits of. 2 Stark. Ev. 860. In an action by an innkeeper for words spoken of him in trade, proof that upon one occasion, he sold spirits to be consumed out of his house is sufficient. *Whittington v. Gladwin*, 2 C. and P. 146.* Where the plaintiff averred that he was employed by "the New England Company," and that the libel was published of him in such employment, it was held sufficient to prove that the Company was commonly so called, though that was not its legal name. *Rutherford v. Evans*, 6 Bingham 451.*

The allegation that the words were spoken in the presence and hearing of A. B., and others, is supported by proof that they were spoken in the presence of others only. *B. N. P. 6*.

* 19 Eng. Com. Law Reps. 128. * 10 Id. 36. * 12 Id. 64.

Proof of inuendo.] The plaintiff must in general prove the inuendos as laid. Thus where the words, in fact, imputed either a fraud or a felony, but by the inuendo were confined to the latter, Lord Ellenborough ruled that the plaintiff must prove that they were spoken in the latter sense. *Smith v. Carey*, 3 *Campb.* 461. So if the plaintiff in stating a libel, connects it by inuendo with a particular allegation, he will be bound to prove a libel relating to the matter contained in that allegation. *Per Bayley, J., May v. Brown*, 3 *B. and C.* 128;* and see *Sellers v. Till*, 4 *B. and C.* 656.† But where the inuendo does not refer to any precedent averment, but improperly introduces new matter not necessary to sustain the action, it need not be proved, but may be rejected as surplusage, *Roberts v. Camden*, 9 *East*, 93.

Proof of malice.] Where the publication is defamatory, the law infers malice unless something can be drawn from the circumstances attending the publication to rebut that inference. *Per Le Blanc, J., R. v. Creevy*, 1 *M. and S.* 282. In such cases, therefore, it is unnecessary for the plaintiff to adduce any evidence of malice. But in actions for such slander as is *prima facie* excusable, on account of the cause of speaking or writing it, as in the case of servants' characters, or confidential advice, or communications to persons who ask it, or have a right to expect it, malice in fact must be proved. *Per Bayley, J., Bromage v. Prosser*, 4 *B. and C.* 256.‡ In order to maintain an action against a master for giving a false character of a servant, extraordinary circumstances of express malice must be proved. *Per Ld. Mansfield, C. J., Hargrave v. Le Breton*, 4 *Burr.* 2425. To prove such express malice, evidence that the character given was false, is admissible. *Rogers v. Clifton*, 3 *B. and P.* 587. *King v. Waring*, 5 *Esp.* 13. *Patterson v. Jones*, 8 *B. and C.* 578.⁴

Evidence of other words or libels.] In an action for libel or for words, evidence of other libels or words is sometimes given, to show the *animus* of the defendant: thus it may be proved that the defendant spoke the same words at different times; *Charlton v. Barrett, Peake*, 22; so words spoken *after* those for which the action is brought, and whether actionable or not, are admissible to show *quo animo* the words which are the subject of the action were spoken. *Rustell v. Macquister*, 1 *Campb.* 49 (n). *Tate v. Humphrey*, 2 *Campb.* 73 (n). *Lee v. Huson, Peake*, 166. *Macleod v. Wakley*, 3 *C. and P.* 312;⁵ but see *Meade v. Daubigny, Peake*, 124. So in an action for a libel published in a weekly paper, evidence was admitted that other papers of the same title had been *since* purchased at the defendant's shop, to show that the papers which purported to be weekly publications of public transactions were sold deliberately, and vended in the regular course of public

* 10 Eng. Com. Law Reps. 30. † 10 Id. 434. ‡ 10 Id. 322. § 15 Id. 303.
⁵ 14 Id. 322.

circulation; but Lord Ellenborough added, that he should direct the jury not to take it into consideration in damages. *Plunkett v. Cobbett*, 5 *Esp.* 136. Evidence of other libels is not admissible, unless they directly refer to the libel set out in the declaration; *Finnerty v. Tipper*, 2 *Campb.* 72; and where the libellous intention of the defendant was not equivocal, Lord Ellenborough rejected evidence of subsequent publications, which were offered to show the *animus* of the defendant. *Stuart v. Lovell*, 2 *Stark.* 95.* Where other words than those laid in the declaration are thus given in evidence, the defendant may prove such words to be true, because he had no opportunity of justifying them. *Warne v. Chadwell*, 2 *Stark.* 457.*

Evidence of plaintiff's good character.] The plaintiff will not be allowed to go into general evidence of his good character, either where the general issue alone is pleaded, or where there are pleas of justification on the record. *Stuart v. Lovell*, 2 *Stark.* 93.* *Cornwall v. Richardson, R. and M.* 305.

Proof of damage.] Where the words are actionable in themselves, it is not necessary, in order to sustain the action, to give any evidence of damage; *Tripp v. Thomas*, 3 *B. and C.* 427;† but where special damage is the gist of the action, it must be proved as laid, or the plaintiff will be nonsuited. *B. N. P.* 6. In such cases the defendant will not be allowed, under a general allegation of damage, to give in evidence particular instances of damage; *B. N. P.* 7, 1 *Saund.* 243, *d* (n); but where the declaration in an action for slander imputing incontinence to the plaintiff, stated that he was preacher to a dissenting congregation in a certain chapel, and derived considerable profit from his preaching; and by reason of the slander, "the said persons frequenting his chapel had refused to permit him to preach there, and had discontinued giving him the gains which they usually had, and otherwise would have given," it was held sufficient, without saying who those persons were. *Hartley v. Herring*, 8 *T. R.* 130. Where the declaration stated that in consequence of the libel, the plaintiff lost the profits of certain performances at the theatre, it was held that the box-keeper might be asked "whether the receipts of the house had not diminished," but not "whether particular persons had not in consequence given up their boxes." *Ashley v. Harrison*, 1 *Esp.* 48. The persons particularised in the declaration, as having left off dealing, &c. with the plaintiff, are the proper witnesses to prove that fact, 1 *Saund.* 243 *d* (n), which cannot be proved from their declarations. *Tilk v. Parsons*, 2 *C. and P.* 201;‡ 1 *Esp.* 50.

The special damage must be the legal and natural consequence of the words spoken, and not the mere wrongful act of a third person; *Vicars v. Wilcocks*, 8 *East*, 1; and it must not be too remote: thus where the defendant libelled a public performer, in consequence

* 3 *Eng. Com. Law Reps.* 261. † 3 *Id.* 430. ‡ 10 *Id.* 139. • 18 *Id.* 89.

of which she refused to sing, and the party who had engaged her to sing, brought an action on the case, Lord Kenyon was of opinion that the injury was too remote, and impossible to be connected with the cause assigned for it. *Ashley v. Harrison*, 1 *Esp.* 48. The loss of the substantial benefit arising from the hospitality of friends is sufficient damage. *Moore v. Meagher*, 1 *Taunt.* 39.

Defence.

Evidence to disprove the malice.] Where the words are *prima facie* actionable, on which the law infers malice, but there are, in fact, circumstances attending the publication which rebut the inference of law, evidence of such circumstances will constitute a good defence under the general issue; *Fairman v. Ives*, 5 *B. and A.* 644,⁴ *Pattison v. Jones*, 8 *B. and C.* 578;⁵ as where the words are spoken,—

1. By a Member of Parliament in his place; but the privilege does not extend to a subsequent publication of them. *R. v. Creevey*, 1 *M. and S.* 273.

2. Where the words are spoken in the course of a legal proceeding, either by the party; *Ram v. Langley*, *Hutt.* 113. *Weston v. Dobneit*, *Cro. Jac.* 432, *Astley v. Young*, 2 *Burr.* 807, *Johnson v. Evans*, 3 *Esp.* 32; by a witness, *Brodie's case*, cited *Palmer*, 144, *Harding v. Bulman*, 1 *Brownl.* 2; by counsel, *Brooke v. Montague*, *Cro. Jac.* 90, *Hodgson v. Scarlett*, 1 *B. and A.* 232; or by a judge, *R. v. Skinner*, *Lofft*, 55, *Jekyll v. Sir J. Moore*, 2 *Bos. and Pul. N.* *R.* 341. So words spoken *bonâ fide*, for the purpose of obtaining redress, or of forwarding the ends of justice, though not spoken in the course of a legal proceeding. *Lake v. King*, 1 *Saund.* 131. *R. v. Baillie*, *Bac. Ab. Libel*, A. 2. *R. v. Baillie*, 2 *Esp. Dig. N. P.* 10, 2d ed. 21 *How. St. Tr.* 10, S. C. *Fairman v. Ives*, 5 *B. and A.* 642.⁶ Where parties thus privileged exceed the limits of their privilege, and use defamatory expressions which the circumstances will not justify, it seems doubtful whether they ought to be sued in a common action for slander, or in a special action on the case, stating that the matter was spoken maliciously, and without reasonable or probable cause. See *Flint v. Pike*, 4 *B. and C.* 481,⁷ 1 *B. and A.* 245 (n). *Fairman v. Ives*, 5 *B. and A.* 645.⁸

3. Where the words are spoken in confidence, by way of advice. Thus, where a party is applied to for the character of a servant, and in giving that character makes use of defamatory words, it is not actionable. *Edmondson v. Stephenson*, *B. N. P.* 8. *Weatherstone v. Hawkins*, 1 *T. R.* 110. But if the supposed libel be not communicated *bonâ fide*, it does not fall within the protection which the law extends to privileged communications. *Per Bayley, J.*, *Patteson v. Jones*, 8 *B. and C.* 584.⁹ Whether the master made the communication voluntarily or not, is a circumstance which the

⁴ 7 Eng. Com. Law Reps. 220. ⁵ 15 Id. 303. ⁶ 7 Id. 14. 220. ⁷ 10 Id. 380.

⁸ 15 Id. 305.

jury are to consider in forming an opinion on the *bona fides*. "I do not mean to intimate," says Lord Alvanley, *Rogers v. Clifton*, 3 B. and P. 592, "that if a servant were strongly suspected of having committed a felony while in his master's service, that master is not at liberty to warn others from taking him into their service; for it is the duty of every person to guard the public against admitting such servants into their houses." "A master may," says Mr. Justice Bayley, *Patteson v. Jones*, 8 B. and C. 578,¹ "when he thinks that another is about to take into his service one whom he knows ought not to be taken, set himself in motion, and do some act to induce that other to seek information from, and put questions to him. The answers to such questions, given *bonâ fide*, with the intention of communicating such facts as the other party ought to know, will, although they contain slanderous matter, come within the scope of a privileged communication. But in such a case it will be a question for the jury whether the defendant has acted *bonâ fide*, intending honestly to discharge a duty, or whether he has acted maliciously, intending to do an injury to the servant." See *Child v. Affleck*, 9 B. and C. 403.² So defamatory words spoken by way of confidential advice to persons who ask it, or have a right to expect it, are privileged. Thus, in an action for saying of a tradesman, "He cannot stand it long,—he will be a bankrupt soon," it appearing that the words were not spoken maliciously, but in confidence and friendship, and by way of warning, Pratt, C. J., directed the jury that though the words were otherwise actionable, yet, if they should be of opinion that they were not spoken out of malice, but in the manner before mentioned, they ought to find the defendant not guilty. *Hervey v. Dawson*, B. N. P. 8. *McDougal v. Clarridge*, 1 Campb. 267. *Dunmore v. Bigg*, Id. 269 (n). Upon the same principle, where the plaintiff brought an action against the defendant for saying he had heard the plaintiff was hanged for stealing a horse, but it appeared upon the evidence that the words were spoken in grief and sorrow for the news, the plaintiff was nonsuited, there being no proof of malice. *Anon.*, *coram Hobart, J.*, cited 1 Lev. 82. But it seems to be no defence to show that the words were spoken carelessly, wantonly, or in jest. *Hawk. P. C. b. 1, c. 28, s. 14, 8th ed.* So words spoken *bonâ fide*, by way of moral advice, are privileged; as if a man write to a father, advising him to have better regard to his children, and using scandalous words, it is only reformatory, and shall not be intended to be a libel. 2 Brownl. 150. But if in such case the publication should be in a newspaper, though the pretence should be reformation, it would be libellous. *R. v. Knight, Bac. Ab. Libel, A. 2*. In these cases, if the circumstances attending the writing or speaking of the words be such as *primâ*

¹ 15 Eng. Com. Law Reps. 805. ² 17 Id. 405.

facie to render them privileged, it is incumbent on the plaintiff, in order to entitle himself to a verdict, to prove malice in fact. See *Bromage v. Prosser*, 4 B. and C. 247.¹

4. Where defamatory words are spoken or written *bonâ fide* with the view of investigating a fact in which the party is interested, they are privileged. Thus, where the defendant inserted an advertisement in a newspaper to ascertain whether, previously to a certain time, the plaintiff had been married, intending, as the inuendo stated, to insinuate that the plaintiff had been guilty of bigamy, but it appeared that the advertisement was inserted by the authority of the plaintiff's wife, Lord Ellenborough held, that if the investigation was set on foot, and the advertisement published by the plaintiff's wife, from anxiety to know whether she was legally the wife of the plaintiff, though that is done through the medium of imputing bigamy to the plaintiff, it is justifiable. *Delany v. Jones*, 4 Esp. 191. *Finden v. Westlake*, 1 M. and M. 461. But if the publication of the libel be more extensive than is necessary for the purpose of obtaining the desired information, it will be actionable. *Brown v. Croome*, 2 Stark. 297.²

5. Whether the publication of the proceedings of a court of justice, where those proceedings contain defamatory matter, is privileged, has never been solemnly decided; but the inclination of the courts appears to be against the existence of such a privilege. See *Lewis v. Clement*, 3 B. and A. 702.³ *Lewis v. Walter*, 4 B. and A. 613.⁴ *Flint v. Pike*, 4 B. and C. 476,⁵ 481; but see *Curry v. Walter*, 1 Esp. 456, 1 B. and P. 525, S. C. *R. v. Wright*, 8 T. R. 298. *Stiles v. Nokes*, 7 East, 504. *R. v. Fisher*, 2 Campb. 270. *Duncan v. Thwaites*, 3 B. and C. 583.⁶ The publication of preliminary or *ex parte* proceedings containing defamatory matter is clearly actionable; as the publication of depositions before a justice of the peace on a charge of murder; *R. v. Lee*, 5 Esp. 123, *R. v. Fisher*, 2 Campb. 563, *Duncan v. Thwaites*, 3 B. and C. 583;⁷ or proceedings on a coroner's inquisition. *R. v. Flint*, 1 B. and A. 379. Where the defence has been, that the libel is a correct account of what passed in a court of justice, it has been usual to plead that defence specially; but it seems that, if available at all, it may be taken advantage of under the general issue, like other privileged communications. Though the defendant cannot plead in justification that the libel is a correct report of a preliminary or *ex parte* proceeding, as a coroner's inquest, yet he may, under the general issue, give in evidence the correctness of the report in mitigation of damages; but no evidence of the truth or falsehood of the facts stated at the inquest is in such case admissible on either side, *East v. Chapman*, 1 M. and M. 46. *Vide post*.

6. So the defendant may show under the general issue that the libel is a fair criticism on the plaintiff's work; but if it contain

¹ 10 Eng. Com. Law Reps. 321. ² 3 Id. 353. ³ 5 Id. 427. ⁴ 6 Id. 535.

⁵ 10 Id. 380. ⁶ 10 Id. 179.

observations unconnected with the work, and personally slanderous, it is actionable; *Carr v. Hood*, 1 *Campb.* 355 (n). *Macleod v. Wakley*, 3 *C. and P.* 311,* *Soane v. Knight*, 1 *M. and M.* 74, *Thompson v. Shackle*, 1 *M. and M.* 187. That publication is not a libel which has for its object not to injure the reputation of any individual, but to correct misrepresentations of fact, to refute sophistical reasoning, to expose a vicious taste in literature, or to censure what is hostile to morality. *Per Lord Ellenborough, Tabart v. Tipper*, 1 *Campb.* 352. So the editor of a newspaper may fairly and candidly comment on any place of public entertainment, but it must be done fairly and without malice, or view to injure or prejudice the proprietor in the eyes of the public. *Per Lord Kenyon, Dibdin v. Swan*, 1 *Esp.* 28. And it is not libellous fairly to comment upon a petition relating to matters of general interest, which has been presented to parliament and published. *Dunne v. Anderson, R. and M.* 287, 3 *Bingh.* 88.*

Evidence of the truth of the libel or words.] Where the defendant admits the publishing or speaking of the libel or words as stated, but justifies so doing because they are true, he must plead this matter specially, and he will not be permitted to give it in evidence under the general issue. *Smith v. Richardson, Willes*, 20, 1 *Saund.* 130 (n). And such evidence is inadmissible under the general issue, either in bar of the action or in mitigation of damages. *Ibid. Underwood v. Parks*, 2 *Str.* 1200.

Evidence that the words were first spoken by another.] It is a good defence that the defendant was only the repeater of the slanderous words, and that he named the author of them at the time, and stated that he had heard them uttered, but such defence must be specially pleaded. *Mills v. Spencer, Holt*, 533.* The words actually uttered by the third person, and not merely the substance of them, must be proved, so as to furnish the plaintiff with a cause of action against such third person. *Maitland v. Gouldney*, 2 *East*, 426. See also *McGregor v. Thwaites*, 3 *B. and C.* 24.* *Lewis v. Walter*, 4 *B. and A.* 605.* It must also be shown that the defendant believed the words to be true, and that he spoke them on a justifiable occasion. *McPherson v. Daniels*, 10 *B. and C.* 263.

Evidence in mitigation of damages.] It was formerly held that where the defendant pleaded the general issue without a justification, he might prove that the plaintiff had been generally suspected of the offence imputed to him by the defendant. *Earl of Leicester v. Walter*, 2 *Campb.* 251. — *v. Moor*, 1 *M. and S.* 284. But it was held that evidence of facts, not amounting to complete justification, could not be received. *Waitham v. Weaver, D. and R. N.*

* 14 Eng. Com. Law Reps. 322. * 11 Id. 43. * 3 Id. 177. * 10 Id. 6.

* 6 Id. 536.

P. C. 10.* And it is now decided that general evidence of the plaintiff's bad character is not admissible in an action for a libel. Thus in an action for a libel on the plaintiff, tending to injure his credit and reputation, in his profession and business of an attorney, it was held that general evidence of his bad character and ill repute in his business could not be admitted either to contradict the allegation in the declaration that the plaintiff exercised and carried on the business of an attorney with great credit and reputation, in order to mitigate the damages on the general issue, or in support of the averments in the defendant's justification, that the plaintiff was a disreputable professor and practitioner in the law. *Jones v. Stevens*, 11 Price, 235. The defendant cannot, in mitigation of damages, give in evidence other libels published of him by the plaintiff, not distinctly relating to the same subject. *May v. Brown*, 3 B. and C. 113.† See *Finnerty v. Tipper*, 2 Campb. 77. Nor is general evidence that the plaintiff has been in the habit of libelling the defendant admissible. *Wakley v. Johnson*, R. and M. 422. But matter which cannot be pleaded in justification, as for instance, that certain proceedings took place at a coroner's inquest, may be given in evidence in mitigation of damages. *East v. Chapman*, 1 M. and M. 46, 2 C. and P. 571,‡ S. C. Ante, p. 297. And in actions for words not actionable in themselves, evidence of their truth may be given under the general issue to disprove malice. *Watson v. Reynolds*, 1 M. and M. 1. So also, as before stated, ante, p. 295, in cases of privileged communications, evidence of the circumstances which render the communications privileged, is admissible under the general issue. And where the defendant published an imperfect account of a trial, which was libellous, he was allowed, in mitigation under the general issue, to show that he had copied the statement from another newspaper, but not that it had appeared concurrently in several newspapers. *Saunders v. Mills*, 6 Bingh. 213.‡

Accord and satisfaction.] Accord and satisfaction is a good defence under the general issue; and where the plaintiff had agreed not to bring the action in consideration of the defendant destroying certain documents relating to the charge imputed to the plaintiff, which the defendant accordingly destroyed, Lord Ellenborough admitted this in evidence as accord and satisfaction. *Lane v. Applegate*, 1 Stark. 97.‡

In an action for a libel, the defendant has a right to have the whole of the publication read from which the passages charged are extracts. *Cooke v. Hughes*, R. and M. 112. See *Mullett v. Hulton*, 4 Esp. 249.

* 16 Eng. Com. Law Reps. 412. † 10 Id. 24. ‡ 12 Id. 268. § 19 Id. 60.
‡ 2 Id. 312.

CASE FOR MALICIOUS PROSECUTION.

In an action on the case for malicious prosecution the plaintiff must prove: 1. The prosecution; 2. Its determination; 3. That the defendant was the prosecutor; 4. His malice and want of probable cause; and, 5. The damages sustained.

Evidence of prosecution.] The fact of the prosecution is usually proved by the production of the record, or of an examined copy. See *ante*, p. 53. *B. N. P.* 13. And the record or copy is admissible without proof of an order of the court or *fiat* of the attorney-general allowing the plaintiff a copy of such record. *Legatt v. Tollervey*, 14 *East*, 302. *Caddy v. Barlow*, 1 *M. and R.* 275. In an action for a malicious prosecution by indicting the plaintiff at the quarter-sessions, it was held by Wilmot, J., that it was not sufficient to produce the original indictment, for that it was no evidence of the caption, which was a material averment in the declaration, viz. that the quarter-sessions were held at such a time and place, and before such parties, and he was of opinion that this could not be supported by parol evidence of the minutes of the sessions, but that for this purpose a record should have been made up, and the original or a copy produced, and the plaintiff was nonsuited. *Edwards v. Williams*, 2 *Esp. Dig. N. P.* 37. Some proof must be given of the identity of the plaintiff and the party prosecuted.

A variance between the charge actually made, and that stated in the declaration, will be fatal. Thus where it was stated in the declaration that the defendant imposed upon the plaintiff the crime of felony, and upon the production of the information before the justice, it appeared that the charge amounted only to a civil injury, though the warrant was to arrest the plaintiff on suspicion of felony, the variance was held fatal. *Leigh v. Webb*, 3 *Esp.* 165. But where the declaration averred that the defendant charged the plaintiff with *assaulting and beating* him, and procured a warrant to apprehend him for his said offence, and the charge in fact made was for *assaulting and striking*, and the warrant produced recited the charge to be for violently assaulting, it was held to be no variance. *Byne v. Moore*, 5 *Taunt.* 187,^b *quære the marginal note*. And where the plaintiff declared that the defendant maliciously charged the plaintiff with *having feloniously stolen* certain articles his property, and it was proved that the defendant laid an information before a magistrate, in which he deposed that the said articles had been feloniously stolen, and that *he suspected and believed, and had good reason to suspect and believe*, that they had been stolen by the plaintiff, it was held that the

^b 1 *Eng. Com. Law Reps.* 69.

evidence supported the declaration. *Davis v. Noake*, 6 *M. and S.* 29, 1 *Stark.* 377,• *S. C. diss. Bayley, J.* Where the plaintiff declares that the defendant maliciously and without probable cause preferred an indictment (setting it forth), the averment is proved if some charges in the indictment were maliciously and without probable cause preferred, though there was good ground for preferring others of the charges. *Read v. Taylor*, 4 *Taunt.* 616. As to other variances in proof of the record, *see ante*, p. 48.

If the proceeding was by preferring a charge before a magistrate, the magistrate or his clerk should be served with a *subpœna duces tecum*, to produce the proceedings. If the information was laid by the defendant, his taking the oath and handwriting should be proved, as also the issuing the warrant to the constable, &c. The warrant must also be produced and proved, and evidence must be given of the apprehension and detention of the plaintiff under the warrant, and of his ultimate discharge. 2 *Stark. Evid.* 910; and *see Freeman v. Arkell*, 2 *B. and C.* 494,⁴ *ante*, p. 11. Where the action is for maliciously procuring the plaintiff to be arrested upon a warrant on a charge of felony, and it does not appear that any information has been taken, evidence may be given of the warrant without proving the information. *Newsam v. Carr*, 2 *Stark.* 69.*

Evidence of determination of prosecution.] It must appear that the prosecution is determined. *B. N. P.* 13. The return of *not a true bill* by the grand jury, or the verdict of acquittal, will be evidence of this fact; and an averment that the plaintiff, "by a jury of the said county, &c. was duly and in a lawful manner acquitted," is proved by a record, by which it appears that the jury found the plaintiff not guilty, and that upon that judgment was entered that he should "go thereof acquitted." *Hunter v. French, Willes*, 517. Where the declaration averred that the defendants "did not prosecute the suit complained of, but therein made default, and their pledges were in mercy, &c." it was held, that the production of a rule to discontinue did not prove the averment, and Lord Tenterden refused to allow an amendment under the stat. 9 Geo. IV. c. 15. *Webb v. Hill*, 1 *M. and M.* 253; and *see ante*, p. 42. An action lies though the plaintiff was acquitted on a defect in the indictment. *Wicks v. Fentham*, 4 *T. R.* 247. *Peppet v. Hearn*, 5 *B. and A.* 634.¹ As to variance, *see Purcell v. Macnamara*, 9 *East*, 157, *stated ante*, p. 48.

Evidence that defendant was prosecutor.] The proper evidence to establish this fact is that the defendant employed an attorney or agent to conduct the prosecution: that he gave instructions concerning it; paid the expenses; procured the attendance of wit-

* 2 *Eng. Com. Law Reps.* 434. • 9 *Id.* 159. • 3 *Id.* 249. • 7 *Id.* 217.

nesses; or was otherwise active in forwarding the prosecution. 2 *Stark. Evid.* 908. So the information taken by the magistrate, or the warrant issued by him, may be sufficient for this purpose. 2 *Phill. Ev.* 161. The indorsement of the defendant's name on the bill is evidence that he was sworn as a witness, though not of his being the prosecutor. *B. N. P.* 14. One of the grand jury before whom the bill was preferred may be called to prove that the defendant was the prosecutor. *Sykes v. Dunbar, Selw. N. P.* 1004.

Evidence of malice.] It is essential that the plaintiff should give some evidence of the defendant's malice. Proof of an acquittal for want of prosecution is not even *prima facie* evidence of malice to support the action. *Purcell v. Macnamara*, 9 *East*, 361. But if the plaintiff prove want of probable cause, malice may be inferred from thence. *Ibid. Burley v. Bethune*, 5 *Taunt.* 583.^a *Turner v. Turner, Gow*, 20.^b Proof that the defendant published an advertisement of the finding of the indictment with other scandalous matter, is evidence of malice. *Chambers v. Robinson*, 1 *St.* 691. Where a forged note was taken in the ordinary course of business, and a bank inspector in the absence of any circumstances of suspicion charged the taker as having the note in his possession, knowing it to be stolen, Lord Ellenborough held that this was such a *crassa ignorantia* that it amounted to malice. *Brooks v. Warwick*, 2 *Stark.* 389.^c In an action by A. for the malicious prosecution by C. of an indictment against A. and B., evidence of the misconduct of C. towards B. after his apprehension, tending to show the bad motives of C., is admissible in proof of malice. *Caddy v. Barlow*, 1 *M. and R.* 275. To support the averment of malice it must be shown that the charge is wilfully false. *Per Abbott, C. J., Cohen v. Morgan*, 6 *D. and R.* 9.^d

Evidence of want of probable cause.] The plaintiff must give some evidence of want of probable cause. *Incedon v. Berry*, 1 *Campb.* 203 (n). But proof of express malice is not evidence of it. *Johnson v. Sutton*, 1 *T. R.* 545, *Turner v. Turner, Gow*, 20.^b Abandoning the prosecution is not sufficient evidence of want of probable cause. *Incedon v. Berry*, 1 *Campb.* 203 (n). Nor neglecting to prefer an indictment after a charge laid. *Wallis v. Alpine, Id.* 204 (n). *Willans v. Taylor*, 6 *Bingh.* 188.^e So proof that the bill was thrown out by the grand jury is not evidence of the want of probable cause. *Byne v. Moore*, 5 *Taunt.* 187.^f But in *Nicholson v. Coghill*, 4 *B. and C.* 23,^g it is said by Holroyd, J., that in actions for malicious prosecutions it has been held that evidence of the bill having been thrown out by the grand jury is sufficient to warrant an inference of the absence of probable cause. Where the plaintiff refused to give up a forged note which he had taken in the

^a 1 *Eng. Com. Law Reps.* 196. ^b 5 *Id.* 444. ^c 3 *Id.* 396. ^d 16 *Id.* 250.

^e 19 *Id.* 47. ^f 1 *Id.* 69. ^g 10 *Id.* 269.

course of business, to the defendant, a bank inspector, and the defendant, in the absence of all circumstances of suspicion, charged the plaintiff before a magistrate, with feloniously having the note in his possession, it was held to be evidence of want of probable cause to go to the jury. *Brooks v. Warwick*, 2 Stark. 289.* If the defendant laid all the facts of the case fairly before counsel, and acted *bonâ fide* upon the opinion given by that counsel (however erroneous it may be), it will be evidence to prove probable cause. *Per Bayley, J., Ravenga v. Macintosh*, 2 B. and C. 697.† And see *Snow v. Allen*, 1 Stark. 502.‡ But not unless a full statement of the case has been laid before counsel. *Hewlett v. Crutchley*, 5 Taunt. 281.†

It has been said that where the facts lie in the knowledge of the defendant himself, he must show a probable cause, though the indictment be found by the grand jury, or the plaintiff shall recover without proving express malice. *Parrott v. Fishwick*, B. N. P. 14. And see 4 B. and C. 24,§ 6 Bingham. 187, 189.¶ But this position is not supported by another report of the same case, 9 East, 362 (n), from which it appears that the plaintiff having been acquitted on the indictment, Lord Mansfield said, "that it was not necessary to prove express malice, for if it appeared there was no probable cause, that was sufficient to prove an implied malice, which was all that was necessary to support this action. For in this case all the facts lay in the defendant's own knowledge, and if there were the least foundation for the prosecution, it was in his power, and incumbent upon him to prove it." It seems from this report that some evidence of want of probable cause had been given, from which malice was inferred, and that the question was whether it was incumbent upon the plaintiff to go further. So in *Sykes v. Dunbar*, cited 9 East, 363, where the defendant was the only witness upon the indictment, Lord Kenyon ruled that the proof of malice lay upon the plaintiff. And in a late case it was said by Tindal, C. J., that the plaintiff must take the first step; because it is not to be presumed that any one has acted illegally. There must, therefore, be some evidence of want of probable cause before the defendant can be called upon to justify his conduct. *Willans v. Taylor*, 6 Bingham. 187.¶ In that case the defendant presented two bills for perjury against the plaintiff, but did not himself appear before the grand jury, and the bills were ignored. He then presented a third bill, and on his own testimony it was found. This prosecution he kept suspended for three years, till the plaintiff taking the record down to trial, and the defendant declining to appear as a witness, although in court, and called on, the plaintiff was acquitted. It was held that this was sufficient *prima facie* evidence of want of probable cause. See further as to proof of want of probable cause. *Cotton v. James*, 1 Barn. and Adol. 128.

* 3 Eng. Com. Law Reps. 396. † 9 Id. 225. ‡ 2 Id. 485. § 1 Id. 107.

¶ 10 Id. 269. † 19 Id. 47.

The observations of the judge on the trial of the indictment tending to cast censure on the mode in which the prosecution had been conducted, are admissible for the plaintiff. *Warne v. Terry*, coram *Littledale, J.*, *M. S. Winton Sum. Ass.* 1826.

Damages.] The jury will give damages for the loss of reputation, the imprisonment, if any have taken place, and the expenses incurred by the plaintiff in making his defence. *B. N. P.* 13.

Defence.

The defendant may give in evidence facts to disprove the malice, or to show that he had probable cause for the prosecution. Thus he may show that the jury deliberated on the trial of the indictment. *Smith v. Macdonald*, 3 *Esp.* 7. Lord Kenyon ruled that the defendant might give evidence of the plaintiff's bad character; *Rodriguez v. Tadmire*, 2 *Esp.* 721; but in a late case *Wood, B.*, refused such evidence, on the ground that it afforded no proof of probable cause to justify the defendant. *Newsam v. Carr*, 2 *Stark.* 71.^a

If no one was present at the time of the supposed felony committed, but the defendant or his wife, his or her evidence on the trial of the indictment is, it is said, admissible for the defence to prove the felony committed. *B. N. P.* 14, 15.

CASE FOR MALICIOUS ARREST.

In an action on the case for a malicious arrest, the plaintiff must prove the arrest, the determination of the suit, the defendant's malice and want of probable cause, and the damage.

The arrest.] If the form of the declaration require it, the plaintiff should be prepared to prove the affidavit to hold to bail, by the production of the original, or of an examined copy, *Crook v. Dowling*, 3 *Dougl.* 75, *B. N. P.* 14, *S. C.* *Casburn v. Reed*, 2 *B. Moore*, 60,^v see *R. v. James*, 1 *Show.* 397, *Rees v. Bowen*, 1 *M^cCl. and Y.* 392; but unless there be an allegation in the declaration that the writ was indorsed for bail "by virtue of an affidavit, filed, &c." it seems to be unnecessary to prove the affidavit, *Arundell v. White*, 14 *East*, 224, unless for the purpose of connecting the defendant with the arrest. The writ indorsed was held by Mr. J. Buller to be sufficient evidence of the holding to bail. *Rogers v. Ilcombe*, 2 *Esp. Dig. N. P.* 38. The plaintiff must also prove the writ and return, *ante*, p. 56, and in one case, though the return of *cepi corpus* appeared on the writ, Lord Kenyon ruled, that as against the defendant there was no evidence of the arrest having been under the writ, and the plaintiff not being able to prove the warrant, was non-

^a 3 *Eng. Com. Law Reps.* 249. ^v 4 *Id.* 405.

sued. *Lloyd v. Harris, Peake*, 174. But it seems that the sheriff's return is *prima facie* evidence of the fact therein stated. *Gyfford v. Woodgate*, 11 *East*, 297; *and see 2 Phill. Evid.* 166. In order to prove the arrest, the plaintiff may call the sheriff's officer. If a bailiff, who has a process against one, says to him when he is on horseback, or in a coach, "You are my prisoner, I have a writ against you," upon which he submits, turns back or goes with him, though the bailiff never touch him, yet this is an arrest, because he submitted to the process; but if instead of going with the bailiff he had gone or fled from him, it could be no arrest, unless the bailiff had laid hold of him. *Per Cur. Herne v. Battyn, B. N. P.* 61. Where a sheriff's officer having a warrant to arrest A. sent a message to him to fix a time to call and give bail, and A. accordingly fixed a time, attended and gave bail, in an action for a malicious arrest, this was held to be no arrest. *Bury v. Adamson*, 6 *B. and C.* 528.* Where the officer showed the party the writ, saying that as he knew him, he would take his word, but that he must give bail, and after receiving a fee from him, left him and went to his attorney to tell him what had occurred, Lord Tenterden said, that his strong opinion was, that this was no arrest. *Goye v. Radford*, 3 *C. and P.* 464,* *and see more as to arrest, post, "Actions against Constables."*

Determination of the suit.] It is necessary to show how the proceeding complained of, whether civil or criminal, terminated, and the proof must correspond with the allegation. Therefore where it was averred that "the plaintiffs in that action did not prosecute their suit, but therein made default, whereupon it was considered that the said plaintiffs should take nothing by their bill, and the pledges to prosecute be in mercy, &c." It was ruled that this being an allegation of a nonsuit was not proved by a rule to discontinue, and that the variance could not be amended under *stat. 9 Geo. IV. c. 15, Webb v. Hill*, 1 *M. and M.* 253. Proof of a rule to discontinue, and that the costs have been accordingly taxed and paid, is sufficient evidence of the determination of the suit. *Bristow v. Haywood*, 4 *Campb.* 214, 1 *Stark.* 48; *S. C. Gadd v. Bennett*, 5 *Price*, 540, *Brandt v. Peacock*, 1 *B. and C.* 649;† so a rule to stay proceedings, and deliver up to the then defendant the bill of exchange upon which the action was brought, *Brook v. Carpenter*, 3 *Bingh.* 297;‡ but where the evidence of the determination of the suit was a judge's order to stay proceedings, and payment of costs accordingly, Lord Kenyon was inclined to think that it was insufficient: a juror was afterwards withdrawn. *Kirk v. French*, 1 *Esp.* 80, *and see 4 Campb.* 214, *sed quare*, *and see Austin v. Debnam*, 3 *B. and C.* 140.¶ In an action for a false arrest upon a plaint in the

* 13 *Eng. Com. Law Reps.* 245. † 14 *Id.* 391. ‡ 3 *Id.* 389. § 8 *Id.* 172.

¶ 11 *Id.* 108. † 10 *Id.* 37.

Sheriff's court of London, evidence was given that the usual course of that court, upon the abandonment of a suit by the plaintiff, was to make an entry in the minute-book of "withdrawn," and it was held that proof of such entry in the minute-book was sufficient to prove the determination of the suit. *Arundell v. White*, 14 East, 216. The termination of the suit must be such as to show *primâ facie* evidence that the action was without foundation: therefore, where it appeared that a *stet processus* had been entered by consent, the plaintiff was non-suited. *Wilkinson v. Howel*, 1 M. and M. MSS.

Evidence of malice, and want of probable cause.] It lies upon the plaintiff in this action, as in the action of case for a malicious prosecution, *ante*, p. 240, to prove both malice, and the want of probable cause. Proof that the suit was discontinued, was held by Lord Ellenborough not to be evidence of want of probable cause; *Bristow v. Heywood*, 1 Stark. 50;* but in a later case, where the defendant had arrested the plaintiff on an affidavit of debt for money paid to his use, but did not declare, until ruled to do so, and soon afterwards discontinued the action, and paid the costs, this was held to be evidence to go to the jury of malice, and the want of probable cause. *Nicholson v. Coghill*, 4 B. and C. 21.⁴ *Webb v. Hill*, 1 M. and M. 254. That the defendant suffered himself to be non-pressed in the former suit has been held not to be evidence to support this action. *Sinclair v. Eldred*, 4 Taunt. 7. However, in a previous case of *Hamilton v. Reddell*, coram, Pratt, C. J., 4 July 1765, *Bearcroft's MSS.* 22, not cited in *Sinclair v. Eldred*, it was ruled, that the defendant's suffering the former action to be non-pressed was sufficient *primâ facie* evidence of malice. Per Pratt, C. J. "Here the defendant's never proceeding, and suffering a non-pros, is, in my opinion, *primâ facie* evidence of malice. I hold most clearly that the affidavit, arrest, bail, and non-pros, make up sufficient *primâ facie* evidence to call for a defence." Where there are mutual dealings between the plaintiff and defendant, and items known to be due on each side of the account, an arrest for the amount of one side of the account, without deducting what is due on the other, is malicious and without probable cause. *Austin v. Debnam*, 3 B. and C. 129,* overruling *Brown v. Pigeon*, 2 Campb. 594. Taking a less sum out of court, and not proceeding in the suit, is not enough to maintain this action, it appearing that the defendant had claimed a larger sum; *Jackson v. Burleigh*, 3 Esp. 34; and suing out a writ, and arresting a debtor after payment of the debt by him to the creditor's agent, (the affidavit to hold to bail being made before such payment) does not afford evidence of malice. *Gibson v. Chaters*, 2 B. and P. 129. A. by mistake sued out a bailable writ against B., and gave it to an officer to be executed;

and the officer told B. that he had a writ against him; but B. denying that he owed the money, the officer did not take him into actual custody. On inquiry, the mistake was discovered, and B. was told that he need give himself no further trouble in the matter. He afterwards, however, put in bail, and incurred an expense of 14*l*. *Per Lord Ellenborough*, The action cannot be maintained, as no arrest or imprisonment has been proved; there is no evidence of malice, and the plaintiff has suffered no inconvenience except what he has voluntarily brought upon himself. *Bielen v. Burridge*, 3 *Campb.* 140. So where the plaintiff was arrested by the indorsee of a bill of exchange purporting to be drawn on and accepted by him, but in fact not accepted by him, Lord Tenterden ruled that this was not sufficient to support an action for a malicious arrest, the defendant having acted through mistake, and without malice. *Spencer v. Jacob*, 1 *M. and M.* 180.

In an action for not accepting the debt and costs from a party in custody under a *ca. sa.*, the refusal of the plaintiff in the former action to sign a discharge to the sheriff, on tender of the debt and costs, is *prima facie* evidence of malice. *Crozer v. Pilling*, 4 *B. and C.* 26.*

In an action for a malicious arrest, the court of Common Pleas determined that the plaintiff was not entitled to recover more than the taxed costs which he had incurred; *Sinclair v. Eldred*, 4 *Taunt.* 7; and see *Rogers v. Ilcombe*, 2 *Esp. Dig. N. P.* 38. And in a late case, Best, C. J., ruled the same way. *Webber v. Nicholas*, 1 *R. and M.* 419. But Lord Ellenborough ruled that he might recover the amount of costs as between attorney and client. *Sandbach v. Thomas*, 1 *Stark.* 306.*

[*Competency of witness.*] An arbitrator to whom the former cause had been referred, and who, on inspection of the then plaintiff's books, had awarded that he had no cause of action, was rejected by Lord Kenyon, when produced as a witness to prove the malice in this action; upon the principle, that as the parties themselves could not have been examined in the former cause, and as the plaintiff could not have been compelled by a judge at *Nisi Prius* to produce his books, the arbitrator ought not to be permitted to give evidence derived from those sources. *Habershon v. Troby*, 3 *Esp.* 38; but see *Gregory v. Howard*, 3 *Esp.* 113.

CASE FOR EXCESSIVE DISTRESS.

In an action for an excessive distress the plaintiff must prove the tenancy as stated, that rent was due, that a distress was made, and that the distress taken was excessive.

* 10 *Eng. Com. Law Reps.* 271. * 2 *Id.* 401.

Form of action—case or trespass.] At common law no action lay for an excessive distress; *Lynne v. Moody*, *Fitzg.* 85; but a remedy by action on the case was given by the statute of Marlbridge, 52 H. III. c. 4, which enacts that "distresses shall be reasonable, and not too great." Trespass will not lie for taking an excessive distress, because the first entry is lawful; *Lynne v. Moody*, 2 Str. 851, *Fitzg.* 85, S. C.; *Hutchins v. Chambers*, 1 Burr. 590; though an exception to this rule was established in the case of *Moir v. Munday*, cited 1 Burr. 590, where it was held that an action of trespass lay for taking six ounces of gold and one hundred ounces of silver as a distress for 6s. 8d.; but it was said that in all other cases of goods, and other things of arbitrary and uncertain value, the action must be upon the statute. See also *Crowther v. Ramsbottom*, 7 T. R. 658.

Though the tenant before the distress has tendered the rent, which makes the taking unlawful, he may still waive the trespass, and sue in case for an excessive distress. *Branscomb v. Bridges*, 1 B. and C. 145,¹ 2 D. and R. 265, 3 Stark. 171,¹ S. C.

Evidence of the tenancy and rent due.] The allegation in the declaration is general, that the plaintiff held and enjoyed certain premises, as tenant thereof to the defendant, which may be proved in the usual manner.

It is not necessary to prove that the exact sum stated as rent due, was in arrear. Thus where the declaration alleged that a certain sum, to wit, 4l. 3s. and no more, was in arrear, and it appeared in evidence that 82l. 10s. was due to the defendant, who had distrained for 95l., it was held that the plaintiff was entitled to recover. *Sells v. Hoare*, 8 B. Moore, 451, 1 Bingh. 401,² S. C.

If the situation of the premises is strictly described, it must be proved as laid; thus, where they were stated to be in the parish of St. George the Martyr, Bloomsbury, and were proved to be in the parish of St. George, Bloomsbury, the plaintiff was nonsuited. *Harris v. Cook*, 2 B. Moore, 587.¹

Proof of the distress.] The plaintiff must prove that his goods were distrained; but it is not necessary to show that they were sold or taken away, the seizure as a distress is sufficient. See *Sells v. Hoare*, 8 B. Moore, 453.² Where the landlord's agent went upon the tenant's premises, walked round them, and gave a written notice that he had distrained certain goods lying there for an arrear of rent, and that unless the rent was paid, or the goods replevied within five days, they would be appraised and sold, and then went away, not leaving any person in possession; it was held that this was a sufficient seizure to give the tenant

¹ 8 Eng. Com. Law Reps. 43. ¹ 14 Id. 176. ² 8 Id. 359. ¹ 4 Id. 204.

a right of action for an excessive distress, and that the quitting the premises without leaving any one in possession, was not an abandonment of the distress, since the statute 11 Geo. II, c. 19, s. 10, gives the landlord power to impound, or otherwise secure on the premises, goods distrained for rent arrear. *Swann v. Earl of Falmouth*, 8 B. and C. 456.*

The fact of the distress may be proved by calling the broker, or other person who made the distress, and who will prove his authority from the defendant. If this evidence cannot be procured, the plaintiff should give a notice to produce the warrant of distress, and give secondary evidence of it, or should connect the act of the bailiff with the defendant, by some other evidence.

Proof of the excess in the distress.] Where a landlord is about to make a distress, he is not bound to calculate very nicely the value of the property seized; but he must take care that some proportion is kept between that and the sum for which he is entitled to take it. *Per Bayley, J., Willoughby v. Backhouse*, 2 B. and C. 823.† Where seven guineas were in arrear, and goods were taken, valued by the plaintiff's witness at 30*l.* but which, in fact, sold for only 10*l.*, it was contended that the plaintiff ought to be nonsuited; but Lord Ellenborough left the case to the jury, and said, "There is a distinction between the cases where there is but one thing that can be distrained, and where there are many, and so the distress is divisible. If there is but one thing, that can be taken; so that it must be taken, or the party must go without his distress, for taking it no action lies, though it much exceeds the sum for which the distress is taken. But if there are several articles of some value, and there is much more taken than is sufficient to satisfy the rent and expenses, this action is maintainable, and express malice is not necessary to maintain the action, nor required to be proved; but it is not for every trifling excess that this action is maintainable, it must be disproportionate to some extent, and if disproportionate to an excess the action is clearly maintainable." *Field v. Mitchell*, 6 Esp. 71.

In order to establish the excess, the plaintiff must be prepared with proof of the value of the goods seized.

Defence.

The defendant may give evidence that the distress was not excessive, or that the chattel distrained was entire, and that there was no other distress. *Field v. Mitchell*, 6 Esp. 71, *supra*. If the plaintiff has previously recovered in replevin for the same taking, such recovery is a bar in this action. *Phillips v. Berryman*, 3 Dougl. 286, S. C., cited *Schw. N. P. Distress* ix. Where there has been an excessive distress, it is no defence that the plaintiff, after

* 15 Eng. Com. Law Reps. 264. † 9 Id. 256.

the distress, authorised the defendant to sell, and gave him other powers with regard to the goods seized. *Willoughby v. Backhouse*, 2 B. and C. 321, 4 D. and R. 539, S. C. *Sells v. Hoare*, 8 B. Moore, 451, 1 Bingh. 401, S. C. The defendant is not bound by his notice of distress, but may abandon it, and show that more rent was due than is there stated. *Gwinney v. Philips*, 3 T. R. 645. *Crouther v. Ramsbottom*, 7 T. R. 658.

The broker who made the distress is an incompetent witness for the defendant. *Field v. Mitchell*, 6 Esp. 73, ante, p. 82.

COVENANT.

There being no general issue in this action by which the whole declaration can be put in issue, the evidence depends on the nature of the issue joined in each particular case.

Evidence on plea of assignment.] In an action against the assignee of a term on a covenant in the lease, he may plead that he assigned the term before breach; and if the plea be traversed, he must prove the assignment as stated. When the defendant proved that he had executed the assignment, but that it had not been delivered to the assignee, but remained in the hands of the solicitor of the defendant, who had a lien upon it, it was held sufficient. *Odell v. Wake*, 3 Camp. 394. The defendant need not prove notice of the assignment to the plaintiff; *Pitcher v. Tovey*, 1 Salk. 81, *Taylor v. Shum*, 1 B. and P. 21; nor the assent of the assignee to the assignment, for it is presumed. *Ibid*; and see *Townson v. Tickell*, 2 B. and A. 38.

Evidence on plea of Expulsion.] In covenant for non-payment of rent, where the defendant pleads an expulsion, proof of a mere trespass will not maintain the plea. *Hodgkin v. Queenborough*, *Willes*, 131, B. N. P. 177. Expulsion from part is a suspension of the whole rent. *Co. Lit.* 148. b. *Walker's case*, 3 Rep. 22, b, *Gilb. on Rents*, 148.

Evidence on plea of non est factum.] Under the plea of *non est factum*, the plaintiff must produce, and prove the execution of the deed, *vide supra*. Where *profert* has been made, and *non est factum* pleaded, the plaintiff at the trial will not be allowed to prove that the deed has been destroyed, and to give secondary evidence of its contents; *Smith v. Woodward*, 4 East, 585; and it is too late at *nisi prius* to move to put off the trial, in order to amend the declaration by omitting the *profert*; nor will the judge permit the amendment to be made at *nisi prius*; *Paine v. Bustin*, 1 Stark. 74; *

but in case the deed is pleaded as a lost deed, and is found before the trial, it may be given in evidence. *Hawley v. Peacock*, 2 *Campb.* 557.

If there be any material variance between the deed set out and that produced, it will be fatal, unless the deed has been set out on *oyer*, see *ante*, p. 39; under this plea the defendant may give in evidence that the party executing was a lunatic; *Yates v. Bohen*, 2 *Str.* 1104; or intoxicated; *B. N. P.* 172; or that being blind, or illiterate, the deed was falsely read to him; *Thoroughgood's case*, 2 *Rep.* 9; or that she was a feme covert; *B. N. P.* 172, *Lambert v. Atkins*, 2 *Campb.* 272; or that the deed was delivered as an escrow; *Stoyles v. Pearson*, 4 *Esp.* 255, *B. N. P.* 172; so a rasure before action brought, *B. N. P.* 171. But infancy or duress, *N. B. P.* 172, must be specially pleaded; so where a bond or other writing is by act of parliament enacted to be void, the party who is bound cannot plead *non est factum*, but he must take advantage of the statute, by pleading the special matter; *Whelpdale's case*, 5 *Rep.* 119, *a*; and so where the deed is void at common law, on account of the illegality of the consideration, such illegality must be specially pleaded. *Bolton v. Goodridge*, 2 *W. Bl.* 1108. *Collins v. Blanterne*, 2 *Wils.* 352; and see *Mr. Fraser's Note*, 5 *Co. Rep.* 244. Thus on *non est factum* it was held that the defendant could not give in evidence that the bond was given for repayment to the plaintiff of monies which had been embezzled by the servant of the plaintiff, which consideration had been concealed from the defendant when he executed the bond. *Harmer v. Rowe*, 6 *M. and S.* 146, 2 *Stark.* 35, *S. C.*; see *Thompson v. Rock*, 4 *M. and S.* 338, *infra*, where it was held that under *non est factum* the defendant might show that a bail bond was executed after the return of the writ.

Evidence on plea traversing the title of the plaintiff.] Where the plaintiff sues as assignee, the defendant may traverse the title as stated, and it will be incumbent upon the plaintiff to prove it, either by proving the mesne conveyances from the original lessor, or by showing that the defendant has paid rent to himself, which will be evidence of the plaintiff's title as assignee. *Doe v. Parker, Peake*, *Ev.* 263, 5th ed.; see also *Carvick v. Blaggrave*, 1 *B. and B.* 531.*

Evidence on plea traversing the title of the defendant.] In covenant charging the defendant as heir, assignee, &c., he may deny his liability as such, and it will lie upon the plaintiff to prove that the defendant is heir or assignee as stated. In an action on a covenant in a lease, the allegation that the reversion came to and vested in the defendant by assignment, is proved by showing that he took as heir, for he is an assignee in law. *Derisley v. Cunstance*, 4 *T. R.* 75. If the plaintiff state the particulars of the defendant's

* 3 *Eng. Com. Law Reps.* 232. * 5 *Id.* 178.

title, instead of alleging generally that the term vested in him by assignment, and if those particulars are traversed, they must be proved as laid; see *Turner v. Eyles*, 3 B. and P. 461; but where the allegation is that the term has vested in the defendant by assignment, it will be sufficient for the plaintiff, *prima facie*, to show that the defendant has paid rent, or is in possession of the premises. 2 *Phill. Ev.* 125, 2 *Stark. Ev.* 437, *Peake, Ev.* 284, 5th ed. Thus where A. had been tenant of certain premises, and upon his leaving them B. had taken possession, it was held in the absence of any evidence to the contrary, that it might be presumed that he came in as assignee of A. although he had never paid rent. *Doe v. Williams*, 6 B. and C. 41.¹ In answer to this the defendant may prove that he is in by an under-lease, and not by assignment. *Holford v. Hatch*, Dougl. 183. *Earl of Derby v. Tylar*, 1 East, 502. If he be charged as assignee of all the estate in certain premises, and he is in fact assignee of the estate in part of the premises only, he should, as it seems, plead in abatement the non-joinder of the other tenants in common. *Merceron v. Dowson*, 5 B. and C. 479.² So he may show that he is only devisee of an equitable estate; *Mayor of Carlisle v. Blamire*, 8 East, 487; or only appointee, and not liable as such on a covenant binding the assigns, not being in by the appointer. *Roach v. Wadham*, 6 East, 289. Where a term has been mortgaged, it is not necessary in an action on a covenant charging the mortgagee as assignee, to prove that he has entered upon the premises. *Williams v. Bosanquet*, 1 B. and B. 238,³ overruling *Eaton v. Jaques*, Dougl. 444. But in order to charge an executor as assignee, it must be proved that he has entered upon the premises. *Tilney v. Norris*, 1 Ld. Raym. 553, 1 Saund. 1, a (n). In order to charge the assignees of a bankrupt termor, as assignees of the term, some evidence must be given of an acceptance of the lease by them, for till they manifest their assent to the assignment, the term still remains in the bankrupt. *Copeland v. Stevens*, 1 B. and A. 593; see 6 Geo. IV. c. 16, s. 75. But it has been held (under stat. 1 Geo. IV. c. 119) that the provisional assignee under the insolvent act, 53 Geo. III. c. 102, cannot refuse the assignment of a lease, and must be deemed to have consented to accept the property. *Crofts v. Pick*, 1 Bingham 354.⁴ *Doe v. Andrews*, 4 Bingham 348,⁵ *Best, C. J., diss.* 2 C. and P. 593,⁶ S. C. See 7 Geo. IV. c. 57, s. 23. Where the assignees of a bankrupt were chosen on the 8th July, and suffered the bankrupt's cows to remain on the premises till the 10th, during which time they were twice milked by order of the assignees, whose servant had received the key of the premises from the messenger under the commission, Lord Ellenborough held these circumstances a sufficient adoption of the demise. *Welsh v. Myers*, 4 Campbell 368. So where they entered upon and took possession of the premises upon which the

¹ 13 Eng. Com. Law Reps. 105. ² 11 Id. 277. ³ 5 Id. 72. ⁴ 8 Id. 345.

⁵ 13 Id. 466. ⁶ 12 Id. 278.

bankrupt's effects remained, and delivered up the keys immediately after the effects were sold. *Hanson v. Stevenson*, 1 B. and A. 303. So where they put up a lease to sale, and accepted a deposit from the purchaser; *Hastings v. Wilson, Holt*, 290;* but the mere fact of putting up a lease to auction, the assignees having never taken possession, and there being no bidder, is not evidence of an acceptance. *Turner v. Richardson*, 7 East, 335. Where an assignee, chosen on the 15th November, 1823, kept the bankrupt upon the premises carrying on the business for the benefit of the creditors until the April following, himself occasionally superintending, but on the 22d Dec. 1823, disclaimed the lease by a letter to the landlord, it was held to be an acceptance; *Clark v. Hume, R. and M.* 207; but where the assignees allowed the bankrupt's effects to remain on the premises for nearly twelve months, and in order to prevent a distress, paid certain arrears of rent, intimating at the same time to the landlord, that they did not intend to take the lease unless it could be advantageously disposed of, and the lease was put up to sale by the assignees, but there were no bidders for it, and the assignees omitted for nearly four months to return the key to the landlord, it was held that there was no evidence of an acceptance. *Wheeler v. Bramah*, 3 Campb. 340. Trustees under an assignment for the benefit of creditors are entitled (like assignees of a bankrupt) to a reasonable time to consider whether they will take the lease. *Carter v. Warne*, 4 C. and P. 191,* 1 M. and M. MSS., S. C.

Evidence on plea traversing the breach.] Where the breach is traversed, it must be proved as laid in the declaration. See *Harris v. Mantle*, 3 T. R. 307.

On a covenant, "not to assign, transfer, or set over, or otherwise do, or put away the indenture of demise, or the premises thereby demised, or any part thereof," it has been held that an underlease is no evidence of a breach; *Crusoe v. Bugby*, 3 Wils. 234; but where the proviso was "not to set, let, or assign over the demised premises, or any part thereof," an underlease was considered to be within the terms of the proviso; *Roe v. Harrison*, 2 T. R. 425; and where a lease contained a proviso for re-entry in case the lessee "should demise, lease, grant, or let the premises, or any part thereof, or convey, alien, assign, or set over the indenture, or his estate therein, or any part thereof, for all or any part of the term," it was held that proof that the lessee had entered into partnership with A., and agreed that he should have the use of a back room, and other parts of the premises exclusively, was evidence of a forfeiture. *Roe v. Sales*, 1 M. and S. 297. But evidence that a lodger has been admitted for above a twelve-month into the exclusive possession of a room, will not support

* 3 Eng. Com. Law Reps. 107. * 19 Id. 336.

a breach of a covenant not to underlet the house. *Doe v. Laming*, 4 *Campb.* 77. A compulsory assignment in law is not a breach of a covenant not to assign. Thus the sale of a lease under a *bonâ fide* execution against the lessee, is not a forfeiture of a condition not to assign, but if the tenant give a warrant of attorney to his creditor for the express purpose of enabling him to take the lease in execution, it will be a fraud and a breach of the condition. *Doe v. Carter*, 8 *T. R.* 57, 64. *Doe v. Skeggs*, cited 2 *T. R.* 134. So an assignment under a commission of bankrupt is no breach of a covenant not to assign; *Doe v. Bevan*, 3 *M. and S.* 353; and see *Doe v. Smith*, 5 *Taunt.* 795;^b and an assignment of the term to trustees for the benefit of creditors, operating as an act of bankruptcy, and being a void deed, will not be a breach of the covenant. *Doe v. Powell*, 5 *B. and C.* 308.^c Whether a devise by will is a breach of a covenant not to assign, seems to be an unsettled question. See *Berry v. Taunton*, *Cro. Eliz.* 331. *Knight v. Mory*, *id.* 60, *Moore*, 351, *Dyer*, 45, b. 3 *Leon.* 67, *Sheph. Touch.* 144. *Swan v. Fox*, *Styles*, 482. *Crusoe v. Bugby*, 3 *Wils.* 237. *Doe v. Bevan*, 3 *M. and S.* 361. On a covenant "not to let, assign, transfer, or otherwise part with, the premises demised, or the lease," depositing the lease as a security was held to be no breach. *Doe v. Hogg*, 4 *D. and R.* 225.^d *Doe v. Laming*, 1 *R. and M.* 36. To prove the breach of a covenant not to assign or underlet, Lord Alvanley held it to be, *primâ facie*, sufficient to show that a stranger was in possession of the premises apparently as tenant, and that on inquiry such stranger said he rented the house. *Doe v. Rickarby*, 5 *Esp.* 4. But on a covenant, "not to assign, set over, or otherwise let," Lord Ellenborough held that evidence that a stranger was in possession of the premises, and that he said he had taken the premises from another stranger, was not sufficient, for *non constat* that the party in possession was not a tortious intruder. *Doe v. Payne*, 1 *Stark.* 86.^e *Sed vide Doe v. Williams*, 6 *B. and C.* 41,^f *supra*.

On a covenant to repair, it is not sufficient evidence to maintain the breach to show that the house has been thrown down by a tempest, unless the covenantor has not repaired within a reasonable time; *Sheph. Touch.* 173; and where the covenant is to keep and leave the house in as good a plight as it was in at the time of the making of the lease, it is said that ordinary and natural decay is no breach of the covenant, and that the covenantor is only bound to do his best to keep it in the same plight, and therefore to keep it covered, &c. *Fitz. Ab. Cov.* 4, *Sheph. Touchs.* 169. Where the covenant is to keep in repair during the continuance of the term, an action for the breach of the covenant may be maintained before the term has expired. *Luxmore v. Robson*, 1 *B. and A.* 584. Breaking a door-way through the wall of the demised house,

^b 1 Eng. Com. Law Reps. 270. • 11 *Id.* 241. • 16 *Id.* 196. • 2 *Id.* 307.

^f 13 *Id.* 105.

into an adjoining house, amounts to a breach of a covenant to keep in repair. *Doe v. Jackson*, 2 Stark. 293.^s

On a covenant for quiet enjoyment generally, it will not support the breach to show a *tortious* disturbance by a stranger, for it is only a covenant against persons having lawful title; *Dudley v. Follett*, 8 T. R. 587, 2 Saund. 178 (n); but where the covenant is against disturbance by a particular person, it is sufficient to show any disturbance by him, whether by lawful title or otherwise. *Nash v. Palmer*, 5 M. and S. 374. So where the covenant is against disturbance by the lessor, his heirs or executors, it is sufficient to show any disturbance by him or them. *Forte v. Vine*, 2 Roll. Rep. 21, 2 Saund. 181, a. Where the covenant is for quiet enjoyment against A., and any other person by his means, title, or procurement, it is sufficient proof of the breach to show an entry by A.'s wife, in whose name A. purchased jointly with his own. *Buller v. Swinerton*, Palm. 639. So in case of a covenant for quiet enjoyment against all claiming by, from, or under him, a claim of dower by his wife is a breach of the covenant. *Godb.* 333, Palm. 340. So the appointee of A. by virtue of a power, in the making of which A. concurred, is a person claiming under him. *Hurd v. Fletcher*, Dougl. 43. So where A. seised in fee settled his estate upon himself for life, remainder to his first and other sons in tail, and made a lease, and covenanted for quiet enjoyment without interruption of the lessor, his heirs or assigns, or any other person claiming any estate, right, or interest, by, from, or under him or any of his ancestors, the eldest son was held to be a person claiming under the lessor. *Evans v. Vaughan*, 4 B. and C. 261.^a Where the covenant is that the defendant has not done, permitted or suffered any act, &c. the assenting to an act which the covenantor could not prevent is not a breach. *Hobson v. Middleton*, 6 B. and C. 295.¹ Where it is necessary to prove a lawful disturbance, the plaintiff must prove the judgment and execution in ejectment, or must give other sufficient evidence of the claimant's title and disturbance; merely forbidding the plaintiff's tenant to pay his rent, is not a breach of the covenant for quiet enjoyment. *Witchcot v. Linesey*, 1 Brownl. 81.

The plaintiff may assign a breach on the implied covenant contained in the word demised; *Com. Dig. Cov. (A 4) Shep. Touchst.* 160; but that covenant ceases with the estate out of which the lease is granted. *Adams v. Gebney*, 6 Bingh. 656.^a If a tenant underlets by deed, and the superior landlord distrains, the under tenant must sue on this implied covenant, and cannot recover in assumpsit. *Schlencker v. Moxy*, 3 B. and C. 789.¹

^s 3 Eng. Com. Law Reps. 352 ^a 10 Id. 327. ¹ 13 Id. 175.

^a 19 Id. 194. ¹ 10 Id. 227.

DEBT ON BOND.

In an action of debt on bond, the plaintiff, on *non est factum* pleaded, must prove the execution of the bond; and where breaches have been assigned under the stat. 8 and 9 Will. III. c. 11, s. 8, he must prove the breaches as assigned.

The breaches must be proved as in an action of *assumpsit* or covenant; but if the breaches have been suggested on the roll, after judgment for the plaintiff on demurrer, it will be necessary to give some evidence that the bond produced, and in which the conditions are contained, is the same as that on which judgment has been obtained; for this purpose it will be sufficient, if the attorney for the plaintiff swears that the bond produced is the instrument delivered to him to bring the action, and that he knows of no other of the same date, without calling the attesting witness. *Hodgkinson v. Marsden, Peake Ev.* 287, 5th ed., 2 Campb. 122, S. C. So where the defendant craved *oyer*, and set out the bond and condition which was for performance of covenants in an indenture of lease, and pleaded a sham plea, to which there was a replication, and then demurred; after judgment for the plaintiff, on the execution of the writ of inquiry, Lord Kenyon ruled that it was not necessary to prove the execution of the lease, as the defendant was estopped by his plea from saying that it was not duly executed. *Collins v. Rybot*, 2 Esp. 157. If the defendant lets judgment go by default, and the plaintiff thereupon makes his suggestion, in which he sets out the condition of the bond, and that appears to be for the performance of an award, or of articles of agreement or the like, the plaintiff must prove the condition of the bond, the award, indenture, or articles, as well as the breaches suggested. *Edwards v. Stone, coram Lawrence, J.*, 1 Saund. 68, e (n).

Defence.

The defendant may plead *non est factum*, which will put the plaintiff upon proof of the execution of the deed, and under which the defendant may give most matters of defence in evidence, *see ante*, p. 64. Though the statute of limitations does not apply to specialties, yet the defendant may, if the deed be upwards of twenty years old, and there has been no payment or acknowledgment of his liability within that period, plead *solvit ad diem*, and rely upon the presumption of payment arising from lapse of time. But if there has been any payment of interest or acknowledgment, after the day appointed for the payment of the money, though upwards of twenty years have elapsed since the payment or acknowledgment, the defendant cannot avail himself of this presumption of payment under the plea of *solvit ad diem*, though he may

under the plea of *solvit post diem*. *Moreland v. Benet*, 1 Str. 652, B. N. P. 174. The issue of *solvit ad diem* lies upon the defendant, and under that plea he may show payment before the day. B. N. P. 173. Proof of payment of the principal only, without interest, will not, as it seems, support the plea of *solvit post diem*; *Hellier v. Franklin*, 1 Stark. 291,^a but see *Dixon v. Parks*, 1 Esp. 110, *contra*; as to the presumption of payment, see *ante*, p. 15.

DEBT ON BAIL BOND.

In an action of debt on a bail bond, the plaintiff, whether he be the sheriff, or his assignee, will only have to prove under the plea of *non est factum*, the execution of the bond in the usual manner. *Hutchinson v. Kearns*, 1 Schw. N. P. 557. The defendant may show under *non est factum*, that the bond was taken after the return^o of the writ, *Thompson v. Rock*, 4 M. and S. 338. See *Harmer v. Rowe*, 6 M. and S. 146; or that the bond was executed before the condition was filled up. *Powel v. Duff*, 3 Campb. 181. If the defendant pleads *ease and favour*, which is traversed, little evidence will be sufficient. *Lenthall v. Cook*, 1 Sid. 384. 1 Saund. 163 (n). Where issue is joined on the plea of *comperuit ad diem*, the trial is by the record, see *Austen v. Fenton*, 1 Taunt. 23, *Tidd*, 239, and the plea is proved by the production of the recognizance roll, containing an entry of the appearance. *Whittle v. Oldaker*, 7 B. and C. 478.^a Where the defendant pleads *nil debet*, and the plaintiff, instead of demurring, takes issue upon that plea, the defendant is let into any defence applicable to the plea of *nil debet*; *Rawlins v. Danvers*, 5 Esp. 38: and in such case it is said that the plaintiff must be prepared to prove, not only the execution of the bond, but also all the averments in the declaration which are put in issue by the plea of *nil debet*, 2 Stark. Ev. 140, 5 Esp. 39. Where the defendant pleaded that there was not any assignment of the bond by the sheriff or under-sheriff, and it appeared in evidence that the bond had been assigned to the plaintiff by one of the under-sheriff's clerks, Lord Mansfield was of opinion that the seal to the assignment, being the seal of office, was sufficient to prove its validity, whoever had signed it. *Harris v. Ashley*, 1 Schw. N. P. 554.

DEBT FOR RENT.

In an action of debt for rent, the plaintiff under the plea of *nil debet* must prove the demise, and the amount of rent in arrear.

The demise may be proved by production and proof of the lease executed by the defendant, but if the plaintiff sues as assignee of

^a 2 Eng. Com. Law Reps. 394. ^a 14 Id. 88.

the reversion, and the defendant has not paid rent to him, he must also prove his title as such assignee by production and proof of the mesne assignments, or by showing that he is heir, &c. See *Sands v. Ledger*, 2 *Ld. Raym.* 792. The assignee of the reversion may maintain debt against the lessee without giving him any notice of the assignment, for the action is sufficient notice; but if the rent has been paid to the original lessor before notice, it is a good defence. *Watts v. Ognell*, *Cro. Jac.* 192. *Birth v. Wright*, 1 *T. R.* 385. A variance between the demise stated, and that proved, will be fatal, but where it was alleged that the plaintiff had demised to the defendant three rooms, and it appeared in evidence that the demise was of three rooms, and the use of the furniture, it was held to be rightly stated accordingly to the legal effect, for the rent could not issue out of the chattels. *Walsh v. Pemberton*, *Schw. N. P.* 588, *Farewell v. Dickenson*, 6 *B. and C.* 251, *Ward v. Smith*, 11 *Price*, 19. A variance in the statement of the rent will be fatal, as where in the declaration it was stated to be 15*l.* per annum, and appeared in evidence to be 15*l.* and three fowls. *Sands v. Ledger*, 2 *Ld. Raym.* 793. So where it was stated that the plaintiff demised "yielding and paying thereupon the yearly rent of 160*l.* by two even, &c." and the lease in fact was "yielding and paying during the said term (except as hereinafter mentioned)," and there was a subsequent clause for the reduction of the rent in a certain case, which had not however occurred, this was held a fatal variance. *Vavasour v. Ormrod*, 6 *B. and C.* 430.*

Defence.

Evidence under the plea of nil debet.] Whether the demise be by deed or not, *nil debet* is a good plea, for the specialty is only inducement to the action. *B. N. P.* 170, and it puts in issue the whole declaration. *Scilly v. Dalley*, 2 *Salk.* 562. The defendant therefore may show under it payment to the plaintiff, or to another by his appointment. *Taylor v. Beal*, *Cro. Eliz.* 222, *Gilb. Ev.* 283, or that the plaintiff has agreed that a debt due by him to the defendant shall go in satisfaction of the rent. *Gilb. on debt*, 443, *on evid.* 283. It seems that the defendant cannot under this plea give in evidence that the plaintiff was bound by covenant to repair the premises, and that he (the defendant) expended the rent in necessary reparations; *Taylor v. Beal*, *Cro. Eliz.* 222, *B. N. P.* 177, but see *Gilb. Ev.* 282; but if the lease be by parol, and the lessor directs the lessee to repair, and the lessee repairs accordingly, the money so laid out may be given in evidence under this plea as evidence of payment; *Gilb. on debt*, 442; and where the covenant for payment of rent contains a proviso, that the tenant may deduct a portion of the rent for repairs, it seems that such deduc-

* 13 *Eng. Com. Law Reps.* 162. ▷ 13 *Id.* 225.

tion may be given in evidence under this plea. *Clayton v. Kinaston*, 1 *Ld. Raym.* 420, *Bayley v. Offord*, *Cro. Car.* 137; see also *Johnson v. Carré*, 1 *Lev.* 152, *City of Exeter v. Clare*, 3 *Keb.* 321. The defendant may also give in evidence under this plea, that the plaintiff expelled him from the premises and kept him out, until after the rent became due, which operates as a suspension of the rent, *B. N. P.* 177, *Gilb. Evid.* 279, 1 *Saund.* 204 (n); and an apportionment of the rent may be given in evidence under *nil debet*. *Hodgkins v. Robson*, 1 *Vent.* 277, *Gilb. on rents*, 189. An eviction by a third person under a title paramount, should, it is said, be pleaded specially. *Wingfield v. Seckford*, 2 *Leon*, 10, 2 *Phill. Ev.* 143, but see *Gilb. on debt*, 429, *contra*, and *quære*. A release may, it seems, be given in evidence under this plea. *Per Holt, C. J.*, *Galloway v. Susach*, 1 *Salk.* 284, 394, *Anon.* 5 *Mod.* 18. *Paramour v. Johnson*, 12 *Mod.* 377, but see *Gilb. Ev.* 281, 283, *Gilb. on debt*, 443. Where the demise is by deed, the statute of limitations does not apply. *Freeman v. Stacy*, *Hutt.* 109. Where it was not by deed, it was formerly held that the statute might be given in evidence under the plea of *nil debet*. *Anon.* 1 *Salk.* 278, *Draper v. Glassop*, 1 *Ld. Raym.* 153, *Com. dig. Pleader*, 2 (W. 16), but it is now decided that it must be pleaded. *Chappel v. Durston*, 1 *C. and J.* 1.

Evidence on plea of assignment.] In debt for rent against the lessee, who has pleaded an assignment and acceptance of the assignee before the rent incurred, the assignment must be proved and also the acceptance of the assignee as his tenant, by the lessor; *Marsh v. Brace*, *Cro. Jac.* 334; if the action is against the assignee, he may plead the assignment without any statement of an acceptance; *Tongue v. Pitcher*, 3 *Lev.* 295, *Com. Dig. Debt (F.)*; and an assignment by the assignee before the rent incurred, may, it seems, be given in evidence under *nil debet*. *Skin.* 318, *Vin. Ab. Ev. (Z. a.) pl.* 49.

DEBT FOR DOUBLE VALUE.

In an action of debt for double value, the plaintiff must prove the demise, the determination of the term, the holding over, the demand and notice in writing given to the defendant, and the amount of the double value claimed.

By statute 4 Geo. II. c. 28, s. 1, in case any tenant or tenants for life, lives, or years, or other persons who shall come into possession of any lands, tenements, or hereditaments, by, from, or under, or by collusion with such tenant or tenants, shall wilfully hold over any lands, &c. after the determination of their term, and after demand made, and notice in writing given for delivering the possession thereof by his or their landlord or lessor, or the person or persons to

whom the remainder or reversion of such lands, &c. shall belong, his or their agents, thereunto lawfully authorised, such persons so holding over shall for and during the time he or they shall so hold over, or keep the person or persons entitled out of the possession of the said lands, &c. pay to the person or persons so kept out of possession, their executors, administrators, or assigns, at the rate of double the yearly value of the said lands, &c. for so long time as the same are detained.

Proof of determination of term, and of the demand.] In general the determination of the term will be proved by evidence of the service of a notice to quit upon the defendant, *see post in Ejectment*, and if a notice to quit be proved, it will not be necessary to show a demand, for the notice includes a demand. *Wilkinson v. Colley*, 5 Burr. 2694. The notice must be in writing. Where the defendant has held over, after the determination of a term certain, a demand of the possession must be proved, but it need not appear that the demand was made, on or before the expiration of the tenancy; *Cobb v. Stokes*, 8 East, 361; though the plaintiff will only be entitled to the double value from the time of the demand made, *Ibid.*; and where the rent is reserved quarterly, and the demand is made in the middle of a quarter, the plaintiff cannot recover the single rent for the antecedent fraction of the quarter. *Ibid.* Where the notice was served upon the tenant, a feme sole, who married before the expiration of the year, it was held that the landlord might maintain debt against the husband, without making a demand of the possession from him, and that in such action it was not necessary to join the wife for conformity. *Lake v. Smith*, 1 N. R. 174. A person appointed by the court of Chancery to receive the rents and profits of the estate, is a sufficient agent within the statute to make the demand. *Wilkinson v. Colley*, 5 Burr. 2694.

Defence.

The defendant may show that the plaintiff has waived the notice to quit and demand of possession; and where the plaintiff has accepted rent from the defendant, after the expiration of the notice to quit, it is a question for the jury, whether such rent was received in part satisfaction of the double value, or as a waiver of it; *Ryal v. Rich*, 10 East, 52; and where the landlord declared in debt, 1st for the double value, and 2d for use and occupation, and the tenant pleaded *nil debet* to the first count, and a tender of the single rent before action brought to the second, and paid the money into Court, which the plaintiff took out of court and proceeded, it was held that this was no waiver of the plaintiff's right to the double value, so as to be ground of nonsuit, but that

it was a case to go to the jury; and that the plaintiff going on with the action, after taking the single rent out of court, was evidence, to show, that he did not mean to waive his claim for the double value, but to take the single rent *pro tanto*. *Ibid.* A recovery in ejectment is no waiver of the landlord's right to the double value, for the time between the expiration of the notice to quit, and the time of recovering possession under the ejectment. *Soulsby v. Nevins*, 9 East, 310. A tenant who holds over, under a fair claim of right, will not be considered as wilfully holding over within the statute, though it appear eventually that he had no right. *Wright v. Smith*, 5 Esp. 203, 6 East, 312.

DEBT FOR DOUBLE RENT.

The proofs in this action are substantially the same as in the action of debt for the single rent.

By stat. 11 Geo. II. c. 19, s. 18, if any tenant shall give notice of his intention to quit the premises holden by him at a time mentioned in such notice, and shall not accordingly deliver up the possession thereof at the time in such notice contained, then such tenant, his executors or administrators, shall thenceforward pay to the landlord double the rent or sum which he should otherwise have paid, to be levied, sued for, and recovered, at the times, and in the same manner as the single rent or sum, before the giving of such notice, could be levied, &c., and such double rent or sum shall continue to be paid during the time such tenant shall continue in possession.

The notice mentioned in the statute need not be in writing; *Timmins v. Rowlinson*, 3 Burr. 1603; but it must give a fixed time for quitting: thus a notice to quit, "as soon as the tenant can get another situation," does not render him liable on this statute, though he has got another situation. *Farrance v. Elkington*, 2 Campb. 591. The statute only applies to those cases in which the tenant has the power of determining his tenancy by a notice, and where he actually gives a valid notice sufficient to determine it. *Johnson v. Huddleston*, 4 B. and C. 922.

DEBT FOR PENALTIES.

In an action of debt for penalties, the general evidence for the plaintiff is proof of the commission of the act, upon which the penalty has accrued, and, if a time be limited by the statute for bringing the action, that the action was brought within that time, and where the venue is local, that the action is brought in the right county.

* 10 Eng. Com. Law Reps. 471.

In the statement of the offence, it is frequently necessary to allege a contract, and such contract must be proved as laid. Thus in an action of debt for selling coals by an illegal measure, where it was stated that the coals were sold by the defendant to A. and it was proved that they were sold to A. and B., Lord Ellenborough held that the declaration did not state the contract as it was, and that the variance was fatal. *Parish v. Burwood*, 5 *Esp.* 33. *Everett v. Tindall*, 5 *Esp.* 169. So where in an action on the lottery acts, the declaration stated that the defendant insured one number for 43l. 2s., but it appeared in evidence that several numbers had been insured for that sum, the variance was held fatal. *Phillips v. Da Costa*, 1 *Esp.* 59. So in a declaration for usury, a variance in the day of lending, though laid under a *videlicet*, is fatal. *Partridge v. Coates, R. and M.* 153. But in a penal action for exercising a trade without having served an apprenticeship, the plaintiff is not obliged to prove that the defendant used the trade all the time laid in the declaration, it being averred that he forfeited 40s. for each month. *Powell v. Farmer, Peake*, 57. Where the penalty arises from the commission of an act without a legal qualification, the existence of which qualification is peculiarly within the knowledge of the defendant, it will not be necessary for the plaintiff to show the want of qualification. *Apoth. Co. v. Bentley, R. and M.* 159, *ante*, p. 52.

Evidence of commencement of the action.] Where it does not appear by the record that the action was commenced in time, *see ante*, p. 56, the writ should be produced, and if the plaintiff declared within the usual time, no evidence is required to connect the writ with the declaration. *Thistlewood v. Cracroft*, 6 *Taunt.* 144. *Hutchinson v. Piper*, 4 *Taunt.* 555. And the return of the writ need not be shown. *Parsons v. King*, 7 *T. R.* 6, 2 *Saund. d.* (n). But where a writ has been issued within the time, and not served, and an *alias* issues, after the time elapsed, it is then necessary to show the first writ returned, in order to warrant the second. *Harris v. Woodford*, 6 *T. R.* 617. Where a testatum special capias was issued in Michaelmas term, and an *alias* testatum capias in Easter following, but there was no writ in Hilary term, it was held that this was a sufficient commencement of the suit in Michaelmas term to take the case out of the statute of limitations, the suit being actually although irregularly commenced within six years, and that the continuance in Hilary term might be supplied at any time. *Beardmore v. Rattenbury*, 5 *B. and A.* 452. ^{*} *See Gregory v. Hurrill*, 5 *B. and C.* 341. ^{*} *Stanway v. Perry*, 2 *B. and P.* 157. Where the plaintiff's counsel had neglected in the first instance to prove the commencement of the suit, Lord Kenyon ruled that he might prove it at any stage of the cause. *Maugham v. Walker, Peake*, 163; but *see Tovey v. Palmer, infra*.

^{*} 1 *Eng. Com. Law Reps.* 335. ^{*} 7 *Id.* 157. ^{*} 11 *Id.* 251.

Evidence of locality of action.] In general in an action upon a penal statute the plaintiff must prove that the cause of action arose in the county in which the venue is laid. See 31 *Eliz. c. 5, s. 2, Tidd*, 431. The offence of selling coals of a different description from those contracted for, upon stat. 3 *Geo. II. c. 26, s. 4*, is complete in the county where the coals are delivered, and not where they were contracted for, the contract not being for any specific parcel of coals, but for a certain quantity of a certain description. *Butterfield v. Windle*, 4 *East*, 385. In an action on 1 and 2 *P. and M. c. 12*, for driving a distress out of the hundred into another county, the venue may be laid in either county. *Pope v. Davis*, 2 *Taunt.* 252. An action for the penalties of usury on the stat. 12 *Anne, st. 2, c. 16*, can only be brought in the county where the offence is completed, and therefore where the contract is made in one county, and the usurious interest is received in another, the venue must be laid in the latter county. *Pearson v. McGouran*, 3 *B. and C.* 700.* Where the plaintiff had closed his case, but had omitted to prove the offence committed in the proper county, Lord Ellenborough refused afterwards to allow him to give evidence of it, although in fact he was prepared to do so. *Tovey v. Palmer, Esq. on penal stat. 142*; but see *Maugham v. Walker, Peake*, 163, *supra*.

Defence.

The defendant under *nil debet* may give in evidence a proviso in the act, exempting him from the penalty. *B. N. P.* 225. *Sutton v. Bishop*, 4 *Burr.* 2284. But if exempted or discharged by another statute it was formerly thought that the defence ought to be pleaded. *Sibly v. Cuming*, 4 *Burr.* 2470. *B. N. P.* 225. But according to the modern practice the defendant may plead *nil debet* and give in evidence the statute, which would show that he does not owe the penalty. 1 *Phill. Evid.* 302. See *R. v. Pemberton*, 1 *W. Bl.* 230. *R. v. Inhab. of St. George*, 3 *Gampb.* 222. A recovery of the penalties in a former action must be specially pleaded, in order to give the plaintiff an opportunity of replying *Nul tiel record, &c.* *Bredon v. Harman*, 1 *Str.* 701.

As to witnesses entitled to share in the penalty, see *ante*, p. 86.

EJECTMENT.

General Evidence for the Plaintiff.

The lessor of the plaintiff in ejectment must in general prove : 1. A sufficient title in himself at the time of the demise stated : 2. That his title is a *legal* one : 3. In some cases an entry to avoid a fine : 4. In some cases an actual ouster by the defend-

* 10 *Eng. Com. Law Reps.* 215.

ent: 5. The local situation of the premises, where it is described. He is bound also to produce the rule to confess lease, entry, and ouster, as part of his case. *Doe v. Lamble*, 1 *M. and M.* 237.

Proof of a sufficient title.] The plaintiff must recover on the strength of his own title, and not on the weakness of the defendant's. *Martin v. Strachan*, 5 *T. R.* 107 (n). Twenty years adverse possession, since the statute of limitations, 21 *Jac. I.* c. 16, is, as it seems, a sufficient title for the plaintiff in ejectment; *Stocker v. Berney*, 1 *Lord Raym.* 741, 2 *Salk.* 421, *S. C. recog.* *Cholmondeley v. Clinton*, 2 *Jac. and Walk.* 156. *B. N. P.* 103. See also 2 *Saund.* 175 (n). *Taylor v. Horde*, 1 *Burr.* 119. *Ashbottle v. Wyley*, 1 *Str.* 608. *R. v. Cold Ashton*, *Burr. Sett. Ca.* 444, 3 *Evans Stat.* 290, 2 *Prest. Abs.* 294, 421, *Goodtitle d. Parker v. Baldwin*, 11 *East*, 488; against a wrong doer mere possession is a sufficient title. Thus where the plaintiff proved a lease of the premises to himself and a year's possession, and that the defendant took forcible possession, this was held sufficient without proof of the title of the demising parties. *Doe v. Dyeball*, 1 *M. and M.* 346. A tenant who has come in under, or paid rent to his landlord, cannot dispute his title, *vide post*, and a party may be estopped from disputing the title of another in this action by referring the question of the right to the land to an arbitrator, who awards in favour of the lessor of the plaintiff. *Doe d. Morris v. Rosser*, 3 *East*, 11, *sed vide Chamb. Landl. and Ten.* 267. *Hunter v. Price*, 15 *East*, 100.

The lessor of the plaintiff must also show that he had a right of entry at the time of the demise, for if his entry is barred by the statute of limitations, or otherwise, he cannot recover in this action. If his title to enter, therefore, has accrued more than twenty years before the bringing of the action, and there has been an adverse possession during that period, he must be prepared to show himself within some of the exceptions of the statute, *vide post*. If the lessor of the plaintiff had a right of entry at the time of the demise laid, it will be sufficient though the right be divested before trial, for the plaintiff has a right to proceed and recover damages for the trespass. *Co. Litt.* 285, a, *Doe v. Bluck*, 3 *Campb.* 447.

It must also be proved that the lessor of the plaintiff had a sufficient title at the time of the demise laid in the declaration, *B. N. P.* 105. An heir at law may lay the demise on the day on which his ancestor died. *Roe v. Hersey*, 3 *Wils.* 274. And a posthumous son taking lands by way of remainder, under stat. 10 and 11 *Will. III.* c. 16, may lay the demise on the day of his father's death. *B. N. P.* 105. Where an entry has been made to avoid a fine, the demise must be laid after the entry, *vide post*. Where a person comes lawfully into possession, as under a negotiation for a purchase or a lease, ejectment cannot be maintained until such possession has been determined by demand or otherwise; and therefore the demise must appear to be after the demand. *Right v. Beard*, 13 *East*, 210. And so where there has been a tenancy at

will the demise cannot be laid on a day antecedent to the determination of the will. *Goodtitle v. Herbert*, 4 T. R. 680. But in ejectment by a mortgagee against a mortgagor in possession, the demise may be laid on a day anterior to the actual determination of the will. *Per Buller, J., Birch v. Wright*, 1 T. R. 383, *vide post*. If a clause is inserted in the mortgage deed that the mortgagor shall continue in possession until default made in payment of the mortgage-money, the demise must be laid on a day subsequent to the time of payment. 2 *Phill. Ev.* 255.

The demise must be framed according to the legal title of the lessors of the plaintiff, and therefore a joint demise by two persons is not supported by proving that they are entitled as tenant for life and remainderman, for the lease of the latter operates as a confirmation, not as a lease. *Trepot's case*, 6 *Rep.* 13, *a*. Jointenants and coparceners may either join or sever in the demise. Upon a several demise from each, the portion belonging to him may be recovered, and if several jointenants or coparceners join, and declare on the separate demises of each, the whole may be recovered. *Doe v. Read*, 12 *East*, 57. *Doe v. Fenn*, 3 *Campb.* 190. The payment of an entire rent to the common agent of the lessors of the plaintiff is *prima facie* evidence of their joint title. *Doe v. Grant*, 12 *East*, 221. Tenants in common must make several demises in ejectment. *Heatherley v. Weston*, 2 *Wils.* 232, *Co. Litt.* 200, *a*. See 12 *East*, 61. Where a corporation sue in ejectment the demise is stated to be by deed, but no deed need be proved, *Furley v. Wood*, 1 *Esp.* 198, for the lease is admitted by the consent rule.

Plaintiff must prove a legal title.] The plaintiff must prove a legal title, an equitable title is not sufficient.* *Roe v. Read*, 8 T. R. 118, 123. *Doe v. Wroot*, 5 *East*, 138. In conveyances to uses, where a use is limited upon a use, the latter use is not executed, but the legal estate is vested in him to whom the first use was limited. *Tyrrel's case*, *Dyer*, 155, *Gilb. Us.* 161. The statute of uses does not extend to copyholds. *Gilb. Ten.* 182. Nor to conveyances of existing terms of years. *Dillon v. Fraine*, *Poph.* 70, 76, 2 *Inst.* 671, *Gilb. Us.* 198.

With regard to the devises in trust, the rule is, that where something is to be done by the trustees which makes it necessary for them to have the legal estate, such as the payments of the rents and profits to another's separate use, or of the debts of the testator,

* In Pennsylvania an equitable title is sufficient to support ejectment, and, in that state, owing to the want of a Court of Chancery, the action of ejectment is frequently used to enforce specific performance of contracts relating to real estate; and every equitable encumbrance on land may be enforced in this form of action by the court, upon just and equitable conditions. *Muse v. Letterman*, 13 *Serg. and Rawle*, 171.

In that state, a conditional verdict in ejectment, finding for the plaintiff, unless the defendant perform certain acts within a specific time, is good. *Coolbaugh v. Pierce*, 8 *Serg. and Rawle*, 418.

or to pay rates and taxes, and keep the premises in repair, or the like, the legal estate is vested in them, and the grantee or devisee has only a trust estate. 2 *Saund.* 11 b (n), *Kenrick v. Beauclerk*, 3 B. and P. 178. See *Nevill v. Saunders*, 1 Vern. 415. *Say and Sele v. Jones*, 3 Vin. Ab. 262. *Harton v. Harton*, 7 T. R. 652. *Shapland v. Smith*, 1 Br. C. C. 75. *Bagshaw v. Spencer*, 1 Coll. Jur. 378. So it is said by Mr. Justice Bayley, *Houston v. Hughes*, 6 B. and C. 421,* that where an estate is given to trustees and their heirs indefinitely, the trustees will take the fee if the purposes of the trust require that they should have the absolute property in them, or that they should take it for an indefinite period of time, unless a contrary intent is manifested on the face of the will. The same rule of construction is adopted in cases of deeds in trust to sell. *Keene d. Lord Byron v. Deardon*, 8 East, 248. But a mere charge for the payment of debts will not give the trustees the legal estate, unless the testator intends that they shall be active in paying the debts. *Kenrick v. Beauclerk*, 3 B. and P. 175. A trust to receive the rents and profits, and pay them over, vests the legal estate in the trustee; a trust to permit and suffer the cestui que trust to receive the rents and profits, vests it in the cestui que trust. *Broughton v. Langley*, 1 Luth. 814, 823. 2 Lord Raym. 873, S. C. *Doe v. Biggs*, 2 Taunt. 109, *Fearne*, 159. Where an estate is devised to trustees for particular purposes, the legal estate is vested in them as long as the execution of the trust requires it, and no longer; and as soon as the trusts are satisfied it will vest in the person beneficially entitled. *Per Bayley, J., Doe v. Nicholls*, 1 B. and C. 342;† and see *Doe v. Simpson*, 5 East, 171.

In certain cases where the legal estate has been vested in a trustee, and there is no direct evidence of a conveyance or surrender to the cestui que trust, a jury may presume such conveyance or surrender. *Lade v. Holford*, B. N. P. 110. *Goodtitle v. Jones*, 7 T. R. 45. Thus where an estate is directed to be conveyed, a jury may, within four years from the time when the estate was directed to be conveyed, presume that it has been so conveyed by the trustee. *Doe v. Slade*, 4 T. R. 682. So where it is for the interest of the owner of the inheritance that a satisfied term should be considered as surrendered, and it appears that no beneficial purpose can be answered by the continuance of the term, a surrender may be presumed. *Doe v. Wright*, 2 B. and A. 720. Thus a term of 1000 years was created by deed in 1717, and in 1735 was assigned for the purpose of securing an annuity to A., and after that, to attend the inheritance: A. having died in 1741, and the estate having remained undisturbed in the hands of the owner of the inheritance and his devisee from 1735 to 1813, without any notice having been in the meantime taken of the term, except that in 1801 the devisee in whose possession the deeds creating and as-

* 13 Eng. Com. Law Reps. 222. † 8 Id. 92.

signing it were found covenanted to produce these deeds when called for, it was held that under these circumstances the jury were warranted, in an ejectment brought by the heir at law, in presuming a surrender of the term. *Ibid.* Again in the same case of satisfied term, where acts are done or omitted by the owner of the inheritance, and persons dealing with him, as to the land, which ought not reasonably to be done or omitted, if the term existed in the hands of the trustee, and there does not appear to be any thing to prevent a surrender from having been made, those acts are evidence from which a jury may presume such surrender. *Doe v. Hilder*, 2 B. and A. 791. Thus a term of years was created in 1762, and assigned over to a trustee in 1779, to attend the inheritance. In 1814 the owner of the inheritance executed a marriage settlement, and in 1816 conveyed his life interest in the estate to a purchaser as a security for a debt; but no assignment of the term or delivery of the deeds relating to it took place on either occasion. In 1819 an actual assignment of the term was made by the administrator of the trustee of 1779, to a new trustee for the purchaser in 1816. Under these circumstances it was held, in an ejectment brought by a prior incumbrancer against the purchaser, that the jury were warranted in presuming that the term had, previously to 1819, been surrendered. *Ibid.*; but see *Aspinall v. Kempson*, Sugd. V. and P. 427. On the other hand, where a term of years becomes attendant upon the inheritance, either by operation of law or by a special declaration, upon the extinction of the objects for which it was created, the enjoyment of the land by the owner of the reversion thus become the *cestui que trust* of the term, may be accounted for by the union of the two characters of *cestui que trust* and inheritor; and there appears therefore to exist no circumstance from which a jury can imply a surrender. *Doe v. Hilder*, 2 B. and A. 791. *Townsend v. Champernown*, 1 Y. and J. 544. The mere fact of a term being satisfied furnishes no ground from which the jury can presume it surrendered. *Evans v. Bicknell*, 6 Ves. 185. There ought to be some dealing with the term to authorise such a presumption. *Ibid.* *Cholmondeley v. Clinton*, cited Sugd. V. and P. 426. Where a term has been expressly assigned to attend the inheritance, and there has been no act or omission, inconsistent with the existence of the term, there is still less ground to presume a surrender from the mere lapse of time and silence of the party who possesses the inheritance. See Sugd. V. and P. 389, 391. So the recognition of the term as subsisting at a late period, *Doe v. Scott*, 11 East, 478, the fact that it would have been contrary to the duty of the trustees to surrender the estate, *Keane v. Deardon*, 8 East, 267, or that the original enjoyment of the party who sets up the presumed conveyance was consistent with the fact of there hav-

ting been no conveyance. *Doe v. Read*, 5 B. and A. 287,^{*} are all circumstances from which a jury may infer that no conveyance has taken place. No case can be put in which any presumption has been made, except where a title has been shown by the party who calls for the presumption; good in substance, but wanting some collateral matter necessary to make it complete in point of form. *Per Tindal, C. J., Doe v. Cooke*, 6 Bingh. 179.^{*}

Entry to avoid a fine levied with proclamations.] It is never necessary to prove an actual entry made before the ejectment commenced, except in the case of a fine levied with proclamations. *Oates v. Brydon*, 3 Burr. 1687. *Doe v. Watts*, 9 East, 19. To avoid a fine levied without proclamations no actual entry need be proved. *Jenkins v. Pritchard*, 2 Wils. 45. And so where the ejectment is brought before all the proclamations have been made. *Doe v. Watts*, 9 East, 17. Where the fine is levied by a person who has the tortious fee, as a disseisor, an entry is necessary. *Fermor's case*, 3 Rep. 79, a. So where a termor makes a feoffment, and levies a fine but the entry in such case may be within five years next after the fine levied, or next after the expiration of the term. *Whaley v. Tancred*, T. Raym. 210. So where the fine is levied by tenant for life, the entry may either be within five years after the levying of the fine, or after the expiration of the life estate. *Dyer*, 3 b (margin), *Smy v. June*, Cro. Eliz. 220. *Goodright v. Forrester*, 8 East, 552. A fine levied by tenant in tail in possession creates a discontinuance, and no entry can be made, and therefore no ejectment lies. *B. N. P.* 99. If levied by tenant in tail in remainder, it does not divest the estate in remainder, and no actual entry is necessary. *Rave v. Power*, 2 N. R. 1. *Roe v. Elliott*, 1 B. and A. 85. Where a fine is levied by a termor (without a previous feoffment), the reversioner need not prove an actual entry before bringing the ejectment. *Focus v. Salisbury*, Hard. 401. *Doe v. Perkins*, 3 M. and S. 271. A fine levied by one parcener, jointenant or tenant in common, previously to an actual ouster, will not divest his companion's estate; and though the latter be afterwards ousted by the former, he may maintain ejectment without proving an actual entry. *Ford v. Grey*, 1 Salk. 287. *Peaceable v. Read*, 1 East, 568. A fine levied by a reversioner or remainderman divests no estate, and no entry is necessary to avoid it. *Roe v. Elliot*, 1 B. and A. 85. In ejectment by a mortgagee no entry need be proved to avoid a fine levied by the mortgagor while in possession. *Freeman v. Barnes*, 1 Lev. 272. *Hall v. Doe*, 5 B. and A. 687.^{*} The ejectment must be brought within one year after the entry to avoid the fine, by 4 Anne, c. 16, s. 16.

Actual ouster.] The ouster, as well as the lease and entry, is in

^{*} 7 Eng. Com. Law Reps. 79. ^{*} 19 Id. 45. ^{*} 7 Id. 232.

general confessed by the consent rule; but where the action is brought by one jointenant, parcener, or tenant in common, against his companion, the court will allow the defendant to enter into a special rule, confessing the lease and entry, and also the ouster, if an actual ouster of the plaintiff's lessor by the defendant shall be proved at the trial, but not otherwise. Where a tenant in common had been in the sole and uninterrupted possession for thirty-six years, without account to or demand by his companion, this was held to be ground for a jury to presume an ouster. *Doe v. Prosser*, *Cowp.* 217. So if one tenant in possession claims the whole, and denies possession to the other, this being beyond the mere act of receiving the whole rent, is evidence of an ouster. *Doe v. Bird*, 11 *East*, 49. But a bare perception of the profits by one tenant in common for twenty-six years, is no ouster. *Fairclain v. Shackleton*, 5 *Burr.* 2804. And where one tenant in common levied a fine and took the rents and profits afterwards without account, for nearly five years, it was held that there was no evidence from which a jury could presume (contrary to the justice of the case) an ouster of the other tenant. *Peaceable v. Read*, 1 *East*, 568. If a special consent rule has not been entered into, the common consent rule will be evidence of an actual ouster, so as to enable the jointenant to recover. *Oates v. Brydon*, 3 *Burr.* 1895. *Doe v. Cuffs*, 1 *Campb.* 178.

The defendant's possession of the premises.] It was formerly necessary to prove the tenant in possession of the premises for which the action was brought; but such proof is now rendered unnecessary by rules M. 1 G. 4, K. B. and H. 1 and 2 G. 4, C. B. by which the defendant must consent in the consent rule, that he (if he defends as tenant, or in case he defends as landlord, that his tenant) was at the time of the service of the declaration in possession of such premises as he intends to defend.

The local situation of the premises.] The declaration need not state the parish in which the premises are situated, but if it do, a variance will be fatal. *Goodtitle v. Lammiman*, 2 *Campb.* 274. But where they were described as lying in the parish of *Farnham*, and proved to be in the parish of *Farnham Royal*, it was held to be no variance, unless it could be proved that there were two *Farnhams*. *Doe v. Salter*, 13 *East*, 9. And where they were described as situate in the parish of *Westbury*, and it was proved that there were two parishes of *Westbury*, viz. *Westbury on Tyrm* and *Westbury on Severn*, this was held no variance. *Doe v. Harris*, 5 *M. and S.* 326. Where the premises were described as situate in the parish of A. and B., and at the trial it appeared that some of the lands lay in the parish of A., and some in the parish of B., and that there was no parish of A. and B., and the plaintiff had a verdict, the

court refused a rule for a new trial. *Goodtitle v. Walter*, 4 Taunt. 671. If the premises are described to be in *St. Mary Lambeth*, and by the evidence appear to be in *Lambeth*, it not being proved that there are distinct parishes, it seems to be no variance. *R. v. Glos-sop*, 4 B. and A. 619.* *Kirtland v. Pounsett*, 1 Taunt. 570. So where the premises were laid to be in the parish of *St. Luke* in the county of *Middlesex*, and it appeared that there were two parishes of *St. Luke* in that county, the one *St. Luke Chelsea*, and the other *St. Luke Old Street*, usually called *St. Luke Middlesex* (where the premises in fact were), the description was held sufficient. *Doe v. Carter*, 1 Y. and I. 492, *supra*.

Ejectment by Landlord.

In ejectment by a landlord, the lessor of the plaintiff must prove the demise, and its expiration, either by effluxion of time, notice to quit, or forfeiture. If a demise from the lessor of the plaintiff to the defendant be proved, no other evidence of title need be given, as the tenant cannot dispute the title of his landlord. *Doe v. Samuel*, 5 Esp. 174. *Gravenor v. Woodhouse*, 1 Bingh. 43,^b *ante*, p. 47. So in ejectment by the reversioner after an estate for life, the tenant who has paid rent to the tenant for life, cannot dispute the title of the reversioner. *Doe v. Whitroe, D. and Ry. N. P. C. 1*.^c If it appears at the trial that the tenant or his attorney has been served with due notice, the plaintiff shall not be nonsuited for default of the defendant's appearance, or of confession of lease entry, or ouster, but the production of the consent rule and undertaking of the defendant shall be sufficient evidence of lease, entry, and ouster. 1 Geo. IV. c. 87, s. 2. See post "*Trespass for Mesne Profits*."

The demise.] If the demise is by deed or in writing, it must be proved by the production of the original, or of a counterpart original. *Roe v. Davis*, 7 East, 363. If in the defendant's possession, notice to produce it should be given, *ante*, p. 3. Where the lease is by parol it may be proved by a person who was present at the making, or by an admission of the defendant. 2 *Phill. Ev.* 221.

Evidence of a demise from year to year may, in the absence of other proof, be gathered from the payment and receipt of rent. Thus, if the tenant for life leases and dies, and the remainderman receives rent from the tenant, a tenancy from year to year is created. *Sykes v. Burkit*, cited 1 T. R. 161. *Bishop v. Howard*, 2 B. and C. 100.^d So where the party is let into possession under a lease, void by the statute of frauds, payment and receipt of rent will be evidence of a tenancy from year to year,

* 6 Eng. Com. Law Reps. 539. ^b 8 Id. 235. ^c 16 Id. 409. ^d 9 Id. 41.

regulated by the covenants and conditions of the void lease. *Doe v. Bell*, 5 T. R. 171. So where he agrees to hold over after the expiration of a written lease, at an advanced rent, he will be presumed to hold upon the terms of the former lease. *Digby v. Atkinson*, 4 Campb. 275. So where the party is let into possession, and pays rent under an agreement for a lease, a tenancy is created on the terms of the lease. *Mann v. Lovejoy*, R. and M. 355. *Knight v. Bennett*, 3 Bingh 361.* *Doe v. Stratton*, 4 Bingh. 446.[†] So also if, being in possession under such an agreement, he acknowledges that half a year's rent is due. *Cox v. Bent*, 5 Bingh. 185.* See *Freeman v. Jury*, 1 M. and M. 19. A tenancy may also be implied from other circumstances besides the payment or admission of rent due. Thus, where the tenants of glebe lands remained in possession for eight months after the death of the incumbent, it was held that after such a lapse of time it was to be presumed that the new incumbent had assented to the continuance of the tenancy on the same terms as before, and that a notice to quit was necessary. *Doe v. Somerville*, 6 B. and C. 126.[‡]

A demise "not for one year only, but from year to year," has been held to constitute a tenancy for two years at least, not determinable by a notice to quit at the expiration of the first year. *Dunn v. Cartwright*, 4 East, 31. So a demise "for a year, and afterwards from year to year," is a demise for two years; *Birch v. Wright*, 1 T. R. 380; but where the demise was "for twelve months certain, and six months' notice afterwards," Lord Ellenborough held that the tenant was at liberty to quit at the end of twelve months, giving six months' previous notice. *Thompson v. Maberley*, 2 Campb. 573.

Where a tenant enters under an agreement for a lease for seven years, which is never executed, he is not entitled to notice to quit at the end of the seven years. *Doe v. Shotton*, 4 Bingh. 446.[†]

[*Leases or agreements for leases.*] A question frequently occurs, whether the instrument produced is evidence of an actual demise or of an agreement to demise merely. Upon a review of the cases it seems that words of present demise, as, "I demise," or future words conferring a right of enjoyment, as that the party "shall hold and enjoy," are evidence of an actual lease. *Harrington v. Wise*, Cro. Eliz. 486. *Baxter v. Brown*, 2 W. Bl. 973. *Poole v. Bentley*, 12 East, 168. *Barry v. Nugent*, 5 T. R. 165. See also *Wright v. Trezvant*, 1 M. and M. 231. And that the mere stipulation that a lease shall at a future time be executed, which is considered in the light of a covenant for more formal assurance, will not alter the effect of such words. *Ibid.* See *Pinero v. Judson*, 6 Bingh. 210.[‡] But where on the face of the instrument it is evident that a

* 13 Eng. Com. Law Reps. 8. † 15 Id. 36. ‡ 15 Id. 410. § 13 Id. 118.

¶ 19 Id. 56.

future lease is contemplated (though it be not expressly provided for), and at the same time various terms of the tenancy remain to be ascertained, then, though there be words of present demise, the instrument will operate as an agreement only. *Morgan v. Bissel*, 3 Taunt. 72. Again, where it is stipulated that the lessee shall do some act upon the premises before the execution of a formal lease, it is evidence of an intention to make a present demise. *Poole v. Bentley*, 12 East, 168. 13 East, 19. And a stipulation that the agreement shall be considered binding until one fully prepared can be produced, is evidence of the same intent. *Ibid.* *Doe v. Groves*, 15 East, 244. On the other hand, if a forfeiture would be incurred by holding the instrument to be a lease, it is to be presumed that the intention of the parties was to make an agreement only. *Doe v. Clare*, 2 T. R. 739. And any words which show that a future act is to be done before the relation of landlord and tenant commences, as the purchase and addition of another piece of land to the premises, will be evidence that the instrument was not intended to operate as a lease. *Doe v. Ashburner*, 5 T. R. 163, 12 East, 247. So where a stipulation is contained in the instrument, importing that something ulterior the agreement is to be done by way of a regular lease, this is evidence of an agreement merely. *Doe v. Smith*, 6 East, 530.

The law is well settled, that where there is any doubt as to the operation of the contract, the court must endeavour to discover the intention of the parties from the contents of the instrument; and if they see a paramount intention that the instrument shall operate as a lease, they must hold it to be such, although it may contain conflicting expressions. *Per Tindal, C. J., Pinero v. Judson*, 6 Bingh. 210.^k See also *Clayton v. Burtenshaw*, 5 B. and C. 41.^l

Tenancies at will, and cases of lawful possession.] Where a party has been let into possession pending a treaty for a purchase or a lease, *Goodtitle v. Herbert*, 4 T. R. 680, *Dunk v. Hunter*, 5 B. and A. 322;^m or under a void or imperfect lease or conveyance, *Litt. s. 70, Doe v. Fernside*, 1 Wils. 176; or where, having been tenant for a term which has expired, he continues in possession, negotiating for a new one, *Doe v. Stennett*, 2 Esp. 717; in these and the like cases, where a party comes lawfully into possession, he is either tenant at will, or at all events in lawful possession, and cannot be ejected until such possession is determined by demand of possession, breaking off the treaty or otherwise. *Right v. Beard*, 13 East, 210. *Denn v. Rawlins*, 10 East, 24. *Doe v. Jackson*, 1 B. and C. 448.ⁿ But where the vendor of a term, before all the purchase-money was paid, agreed with the vendee that he should have possession of the premises till a given day, paying the reserved rent in the mean time, and that in case he did not

^k ante, p. 331. n (i). ^l 11 Eng. Com. Law Reps. 138. = 7 Id. 115.

^m 8 Id. 126.

pay the residue of the purchase-money on that day, he should forfeit the portion he had already paid, and not be entitled to an assignment of the lease, Lord Ellenborough held that this agreement operated like a clause of re-entry on a breach of covenant in a lease, and that the residue of the purchase-money not being paid on the appointed day, the vendee's interest thereupon ceased, and he might be ejected without any notice, *Doe v. Sayer*, 3 *Campb.* 8. And if a third person, under such circumstances, has come in as tenant to the vendee, ejectment may be maintained against such third person without notice. *Doe v. Boulton*, 6 *M. and S.* 148. So where a man got into possession of a house without the privity of the landlord, and the parties afterwards entered into a negotiation for a lease, but disagreed about the value of the fixtures, Lord Ellenborough was of opinion that if this was a tenancy of any sort it was a tenancy at sufferance, and that a notice to quit was unnecessary. *Doe v. Quigley*, 2 *Campb.* 505; and see *Doe v. Lawder*, 1 *Stark.* 308.*

Notice to quit, how proved.] Where the action is brought on the determination of the tenancy by notice to quit, the notice may be proved by a duplicate original, or examined copy without a notice to produce the original. *Kine v. Beaumont*, 3 *B. and B.* 288.* The notice delivered must be proved to have been properly signed, and if attested, the attesting witness must be called. *Doe v. Durnford*, 2 *M. and S.* 62.

Notice to quit, at what time it must be given.] The notice to quit must be proved to have been given half a year, (182 days) before the end of the year, except where the rent is payable on the usual quarterly feast-days, when notice on one feast-day to quit on the next but one is sufficient. *Right v. Darby*, 1 *T. R.* 159, *Doe v. Green*, 4 *Esp.* 199, *Doe v. Kightley*, 7 *T. R.* 63, *Howard v. Wernsley*, 6 *Esp.* 53. Thus notice on the 28th of September to quit on the ensuing 25th of March is sufficient. *Roe v. Doe*, 6 *Bingh.* 574.* But the period may be controlled by special agreement or local custom. *Roe v. Charnock*, *Peake*, 4 *Timmins v. Rowlinson*, 3 *Burr.* 1609. Where the tenancy is for less than a year, the length of the notice must be regulated by the letting, as a month's notice for a monthly letting. *Doe v. Hassell*, 1 *Esp.* 94. see *Wilson v. Abbott*, 3 *B. and C.* 88.* The notice must expire at the expiration of the year, *Right v. Darby*, 1 *T. R.* 159, or where the tenancy is for less than a year, at the end of such shorter period, or some corresponding period. *Kemp v. Derrett*, 3 *Campb.* 510. On a letting from year to year, to quit at a quarter's notice, the notice must expire with the current year. *Doe v. Donovan*, 1 *Taunt.* 555, 2 *Campb.* 78. The tenancy will be taken *primâ facie* to commence from the day of the

* 2 Eng. Com. Law Reps. 402. * 7 Id. 440. * 19 Id. 169. * 10 Id. 17.

tenant's entry, and not with reference to any particular day. *Kemp v. Derrett*, 3 *Campb.* 510. But where a tenant entered in the middle of a quarter, and afterwards paid for that half-quarter, and continued to pay from the commencement of a succeeding quarter, he was held to be a tenant from the succeeding quarter day. *Doe v. Johnson*, 6 *Esp.* 10. And the same was held by Best, C. J., in *Doe v. Stapleton*, 3 *C. and P.* 275.* However, in another case where the tenant entered in the middle of a quarter, upon an agreement to pay rent quarterly, and for the half-quarter, it was left to the jury to say whether the party was tenant from the quarter day prior to the time when he entered, or from the succeeding quarter day, and under the direction of Lord Ellenborough the jury found that the tenancy commenced from the preceding quarter day. *Doe v. Selwyn*, *Adams Eject.* 129. If a tenant holds over and pays rent after the expiration of his lease, notice to quit must be given with reference to the time of entry under the original lease. *Doe v. Samuel*, 5 *Esp.* 173. So where a tenancy from year to year arises on payment of rent, by a tenant holding under a lease void by the statute of frauds, the void lease will regulate the time of the notice. *Doe v. Bell*, 5 *T. R.* 472, and see *ante*, p. 263. Where the tenant enters upon different parts of the premises at different times, it is sufficient to give half a year's notice to quit, with reference to the original time of entry on the substantial part of the premises demised, which will be good for all. *Doe v. Snowdon*, 2 *W. Bl.* 1224, *Doe v. Spence*, 6 *East*, 120, *Doe v. Watkins*, 7 *East*, 551. A holding from Michaelmas *primâ facie* signifies Michaelmas new style. *Doe v. Vince*, 2 *Campb.* 257. But where the tenancy was from Michaelmas to Michaelmas, Lord Kenyon permitted evidence to be given, that by the custom of the country, such a tenancy was considered to be from old Michaelmas. *Forley v. Wood*, *Runn. Ej.* 112, 1 *Esp.* 198, *S. C.* *Doe v. Benson*, 4 *B. and A.* 588.† And where the notice was delivered on Sept. 27, to quit "at the expiration of the term for which you hold the same," which notice was served personally on the tenant who observed, "I hope Mr. M. does not mean to turn me out," Holroyd, J., permitted the lessor to prove that it was the general custom in that part of the country where the demised lands lay to let the same from Lady-day to Lady-day, and that the defendant's rent was due at Michaelmas and Lady-day respectively; and he directed the jury to presume that this tenancy, like other tenancies in that part of the country, was from Lady-day to Lady-day. *Doe v. Lamb*, *Adams Eject.* 316, 3d ed. So evidence of the intention of the parties is admissible. *Dew v. Hopkinson*, 3 *D. and R.* 507.‡ Where the tenancy is from old Michaelmas, a notice to quit at Michaelmas generally is good. *Doe v. Vince*, 2 *Campb.* 256. But where in a lease by deed, the tenancy was "from the feast of St. Michael," it was

* 14 Eng. Com. Law Reps. 303. † 6 Id. 527. ‡ 16 Id. 177.

held that those words imported *new Michaelmas*, and could not be shown by extrinsic evidence to refer to *old Michaelmas*. *Doe v. Lea*, 11 *East*, 312, 4 *B. and A.* 589.* A notice to quit not personally served upon the tenant is not of itself, even *prima facie* evidence of the tenancy having commenced at that period of the year at which the notice expires. *Doe v. Calvert*, 2 *Campb.* 388. But if personally served upon the tenant, who does not object to it, it is *prima facie* evidence of the commencement of the tenancy, if a specific time for quitting be mentioned. *Thomas v. Thomas*, 2 *Campb.* 648, *Doe v. Foster*, 13 *East*, 405. But such evidence may be rebutted by showing the period when the tenancy did, in fact commence. *Oakapple v. Copous*, 4 *T. R.* 361. Where no specific time to quit was mentioned, but the notice was to quit "at the expiration of the current year," and a declaration in ejectment was served nearly a year afterwards, laying the demise half a year after the notice, and the tenant on being served with the declaration made no objection to the notice to quit, nor set up any right to a longer possession, Lord Ellenborough held that it was a question for the jury to determine, whether the tenant must not be understood as having admitted that the tenancy was determined by the notice. *Doe v. Wombwell*, 2 *Campb.* 559. So where a notice was given to a weekly tenant to quit "on Friday provided his tenancy expired on Friday, or otherwise at the end of his tenancy next after one week from the date of this notice," upon an ejectment brought after a sufficient time had elapsed, to cover a tenancy commencing on any day of the week, the notice was held sufficient. *Doe v. Scott*, 6 *Bingh.* 362.* If the tenant upon application by his landlord, state his tenancy to have commenced on a particular day, he is concluded from disputing the accuracy of such statement. *Doe v. Lambley*, 2 *Esp.* 635. A receipt for rent, stating it to be a year's rent, up to a particular day, is *prima facie* evidence of the commencement of the tenancy at that day. *Doe v. Samuel*, 5 *Esp.* 173.

Notice to quit, to whom to be given.] One of several jointtenants may give notice, which will be good for his share. *Doe v. Chaplin*, 3 *Taunt.* 120. And where a notice is given, signed by a stranger professing to be an agent for all the joint-tenants, their subsequent recognition of his authority will be sufficient. *Goodtitle v. Woodward*, 3 *B. and A.* 689.* Where the ejectment is brought by one person, the bringing of the action seems a sufficient recognition of his agent's authority; but if the defendant holds under several landlords, the mere fact of bringing the ejectment in their names will hardly be sufficient, as it may have been brought by one of the lessors in the name of all, without any joint authority; some further evidence therefore seems necessary, such as proof by the at-

* 6 *Eng. Com. Law Reps.* 528. * 19 *Id.* 104. * 5 *Id.* 424.

torney, that the action has been brought under the joint direction of the several lessors. 2 *Phill. Evid.* 230. If the landlords are partners in trade, in a notice the names of all signed by one only is valid. *Doe v. Hulme*, 2 *M. and R.* 433. Where a lease for twenty-one years contained a proviso, that in case either landlord or tenant, or their respective heirs and executors, wished to determine it at the end of the first fourteen years, and should give six months' notice in writing *under his and their respective hands*, the term should cease; it was held that a notice to quit, signed by two only of three executors of the original lessor, to-whom the freehold was devised as joint-tenants, expressing the notice to be given on behalf of themselves and the third executor, was bad, notwithstanding a subsequent recognition of it by the third executor. *Right v. Cuthell*, 5 *East*, 491. A receiver appointed by the Court of Chancery with authority to let lands, has also authority to give a notice to quit. *Doe v. Read*, 12 *East*, 57. A verbal notice from a steward of a corporation is sufficient without showing an authority under seal. *Doe v. Pierce*, 2 *Campb.* 96. Where there was a proviso in a lease for twenty-one years, that if either of the parties should be desirous to determine it in seven or fourteen years, it should be lawful for either of them, his executors or administrators, so to do upon twelve months' notice to the other of them, his heirs, executors, or administrators, it was held that the devisee of the lessor was entitled to give such notice. *Roe v. Hayley*, 12 *East*, 464.

Notice to quit, to whom to be given.] Where the premises have been underlet, the subtenancy must be determined either by a notice from the lessor to the lessee, or from the lessee to the sublessee; a notice from the lessor to the sublessee is inoperative. *Pleasant v. Benson*, 14 *East*, 234. *Roe v. Wiggs*, 2 *N. R.* 330. The notice from the lessor to the lessee should be served upon the latter, for where the service was upon a relation of the subtenant on the premises, Lord Ellenborough ruled the service to be insufficient, though the notice was addressed to the original lessee. *Doe v. Levi*, *Adams Eject.* 115. Where A. had been tenant of certain premises, and upon his leaving them B. took possession, it was held that in the absence of any evidence to the contrary it might be presumed that he came in as assignee of A., although he had never paid rent, and that notice to quit was rightly given to B. *Doe v. Williams*, 6 *B. and C.* 41. Where a corporation is tenant, notice to quit should be given to the corporation, and served upon its officers. *Doe v. Woodman*, 8 *East*, 228.

Notice to quit, form of.] The notice may be by parol, unless required to be in writing by agreement of the parties, *Timmins v. Rowlinson*. 3 *Burr.* 1603, *Doe v. Crick*, 5 *Esp.* 196, or by the

provisions of a power. *Legg v. Benion, Willes*, 43. Though the courts listen with reluctance to objections to the form of the notice, *Doe v. Archer*, 14 *East*, 245, it must yet be explicit and positive, and not give the tenant an option of continuing under a new agreement; but a notice to quit, "or I shall insist on double rent," was held good, because the latter part of the notice evidently referred only to the penalty inflicted by 4 Geo. II. c. 28, though the terms of that statute which gives double the annual *value*, were mistaken. *D. v. Jackson, Dougl.* 175. If the notice had really contained the option of a new agreement, and said for instance, "or else that you agree to pay double rent," it would not have been good. *Per Lord Mansfield, ibid.* So where the notice was to quit "on the 25th day of March, or 8th day of April next ensuing," and was delivered before new Michaelmas day, it was held good as intended to meet a holding, commencing either at new or old Lady-day, and not to give an alternative. *Doe v. Wrightman*, 4 *Esp.* 5. So in case of an obvious mistake the courts will hold the notice good, as where a notice was given at Michaelmas, 1795, to quit at Lady-day, "which will be in the year 1794," and the defendant was told at the time of the service of the notice, that he must quit at *next* Lady-day. *Doe v. Kighley*, 7 *T. R.* 63. So a notice dated 27th September, and served on the 28th, requiring the tenant to quit at Lady-day *next*, will be understood to mean Lady-day in the succeeding year. *Doe v. Culleford*, 4 *D. and R.* 248.* A misdescription of the premises which can lead to no mistake will not be fatal, as where a house is described as "the Waterman's Arms," when in fact it is called "the Bricklayer's Arms," there being no sign called the Waterman's Arms in the parish. *Doe v. —*, 4 *Esp.* 185. As a lessor cannot determine the tenancy as to part of the things demised, and continue it as to the rest, the notice must include all the premises held under the same demise, and the courts will, if possible, give effect to the notice, so as to determine the tenancy altogether. *Doe v. Archer*, 14 *East*, 245. *Doe v. Church*, 3 *Campb.* 71. Where the notice is in writing, it is not necessary that it should be directed to the tenant in possession, provided it be personally served upon him; *Doe v. Wrightman*, 4 *Esp.* 5; and where it is directed to him by a wrong christian name, and he keeps it, the irregularity is waived. *Doe v. Spiller*, 6 *Esp.* 70. A notice to quit to a tenant of lands originally demised to the rector and churchwardens of a parish, and their successors in trust, signed by the rector and churchwardens, requiring the tenant to deliver up the premises to the rector and churchwardens *for the time being*, is bad. *Doe v. Fairclough*, 6 *M. and S.* 40.

Notice to quit, service of.] It is sufficient if the notice is delivered and explained to the servant of the tenant at his dwelling-house,

* 16 Eng. Com. Law Reps. 202.

though the dwelling-house be not on the demised premises, such service affording presumptive evidence, that the notice came to the hands of the tenant, the servant not being called; *Jones v. Marsh*, 4 T. R. 464; and it is sufficient, though the tenant be not informed of it, till within half a year of its expiration; *Doe v. Dunbar*, 1 M. and M. 10; but it is not sufficient that the notice was left at the tenant's dwelling-house, without showing that it was delivered to a servant, &c. *Doe v. Lucas*, 5 Esp. 153. Service of the notice, on the premises, upon one of two jointenants who resides on the premises, is presumptive evidence of the notice having reached the other jointenant. *Doe v. Watkins*, 7 East, 557. *Doe v. Crick*, 5 Esp. 196. If there be a sub-tenant, the notice from the original lessor must be served upon the lessee. *Vide supra*. Notice to a corporation may be served upon its officers. *Doe v. Woodman*, 8 East, 228.

Notice to quit, waiver of.] The notice may be waived by the acceptance of rent after the expiration of the notice, but the rent must be received *qua* rent, which is a question for the jury. *Goodright v. Cordwent*, 6 T. R. 219. *Doe v. Batten*, Coup. 242. Where a quarter's rent, due after the expiration of the notice, had been received by the landlord's banker without any special authority, though the rent was usually paid to him, it was held, in the absence of any proof that the rent had come to the landlord's hands, not to be a waiver. *Doe v. Calvert*, 2 Campb. 387. A distress for rent accruing after the expiration of the notice, is a waiver. *Doe v. Wilingale*, 1 H. Bl. 311. A recovery in an action for use and occupation, for a period subsequent to the expiration of the notice seems to be a waiver. *Birch v. Wright*, 1 T. R. 387. The notice may be waived by a subsequent notice, for it recognises a tenancy subsisting after the expiration of the former. *Doe v. Palmer*, 16 East, 53. But where a second notice was given after the expiration of the first notice, and after the commencement of an ejectment, in which the landlord continued to proceed, notwithstanding the second notice, it was held no waiver, for it was not possible for the defendant to suppose that the plaintiff intended to waive the first notice, when he knew that the plaintiff was, on the foundation of that very notice, proceeding by ejectment to turn him out. *Doe v. Humphreys*, 2 East, 236. So where, after the expiration of a notice, the landlord gave a second notice, "I do hereby require you to quit the premises which you now hold of me, within 14 days from this date, otherwise I shall require double value," it was ruled that the latter notice having for its object only the recovery of the double value, did not operate as a waiver. *Doe v. Steel*, 3 Campb. 151. So where no notice to quit was necessary, and a notice was given "to quit the premises which you hold

under me, your term therein having long since expired," the court considered it a mere demand of possession, and not a recognition of a subsisting tenancy. *Doe v. Inglis*, 3 Taunt. 54. And where a landlord gave his tenant notice to quit, but promised not to turn him out, unless the premises were sold; and afterwards, and after the expiration of the notice to quit, the premises were sold, but the tenant refused to deliver up the possession, it was held that the promise was no waiver of the notice, and that the refusal of the tenant made him a trespasser from the expiration of the notice to quit. *Whiteacre v. Symonds*, 10 East, 13.

Notice to quit, when dispensed with.] When the tenant has attorned to another person, or done any act disclaiming to hold of his landlord, or has in any way put him at defiance, the landlord may treat him as a trespasser, and no notice to quit will be necessary; *B. N. P.* 96, *Doe v. Whittick*, Gow, 195; but a refusal to pay rent to a devisee under a contested will, the tenant declaring that he was ready to pay the rent to any person entitled to it, was held not to dispense with a notice to quit. *Doe v. Pasquali*, Peake, 196. So it has been ruled that the mere act of paying the rent to a third person does not operate as the forfeiture of a lease. *Doe v. Parker*, Gow, 180. And where the defendant, who held under a tenant for life, received on his death a letter from the lessor of the plaintiff, claiming as heir and demanding rent, to which the defendant answered, that he held the premises as tenant to S., that he had never considered the lessor of the plaintiff as his landlord; that he should be ready to pay the rent to any one who should be proved to be entitled to it; but that, without disputing the lessor of the plaintiff's pedigree, he must decline taking upon himself to decide upon his claim, without more satisfactory proof in a legal manner, it was held that this was a disclaimer. *Doe v. Frowd*, 4 Bingh. 557.*

On forfeiture of the lease.] Where the lessor proceeds on the forfeiture of the lease, he must prove the demise, *ante*, p. 66, and the forfeiture incurred. Where the forfeiture is for the non-performance of a covenant, the lessor of the plaintiff must give some evidence of the non-performance, and it will not in the first instance lie upon the defendant to prove a performance. *Doe v. Robson*, 2 C. and P. 245.† The right of re-entry will appear in proof of the lease. Where, by the agreement of demise, it was "stipulated and conditioned that the tenant should not assign," &c., this was held to be a condition for the breach of which the lessor might maintain an ejectment. *Doe v. Watt*, 8 B. and C. 308.‡ Where the lessee underlet, and in the underlease there was a proviso that, in case of

* 15 Eng. Com. Law Reps. 70. † 12 Id. 111. ‡ 15 Id. 225.

breach of covenant, the *lessor and lessee* might enter, it was held that the lessee alone might take advantage of this proviso. *Doe v. White*, 4 *Bingh.* 276.⁴ If the proceeding be at common law for non-payment of rent, a regular demand of the rent with certain solemnities must be proved. 1 *Saund.* 287 (n). *Doe v. Paul*, 3 *C. and P.* 613.⁵ But by stat. 4 G. II. c. 28, where half-a-year's rent is in arrear, the lessor may, without any formal demand or re-entry, serve a declaration in ejectment; or in case it cannot be served, or no tenant be in possession, affix the same upon the door of the messuage, or if the ejectment be not for a messuage, upon some notorious place of the lands, &c., and such affixing shall be deemed legal service thereof; which service or affixing shall stand in the place of a demand or re-entry, and in case of judgment against the casual ejector, or nonsuit for not confessing lease, entry, and ouster, it shall be made appear to the court where the said suit is depending, by affidavit, or be proved upon the trial, if the defendant appears, that half-a-year's rent was due before the declaration was served, and that no sufficient distress was to be found upon the demised premises counter-vailing the arrears then due, and that the lessor had power to re-enter, in such case the lessor shall recover judgment as if the rent in arrear had been legally demanded, and a re-entry made.

Where a lease contained a proviso for re-entry, in case the rent were in arrear 21 days after the day on which it was due, "being lawfully demanded," it was held (Lord Ellenborough diss.) to be within the statute, and that it was unnecessary to prove an actual demand. *Doe v. Alexander*, 2 *M. and S.* 5 *B. and A.* 385.⁶ Under this statute the landlord must be prepared with evidence of the service of the declaration in ejectment, or of the affixing of the same to the door of the messuage, &c., that half-a-year's rent was due, and that no sufficient distress was found on the premises. It is no ground of nonsuit that the declaration was served on a day subsequent to the day on which the demise was laid, that being after the rent became due. *Doe v. Shawcross*, 8 *B. and C.* 752.⁷ Evidence that there was no sufficient distress on the premises, on a certain day between the day when the rent became due and the service of the declaration, is sufficient *prima facie* evidence. *Doe v. Fuchau*, 15 *East*, 286. It must appear that every part of the premises has been searched. *Rees v. King*, cited 2 *B. and B.* 514,⁸ *Forest*, 19. Unless the tenant prevented the landlord from having access to the premises, as by locking the doors. *Doe v. Dyson*, 1 *M. and M.* 77. A variance between the amount of rent proved to be due, and that demanded in the lessor of the plaintiff's particulars, is immaterial. *Jenny v. Moody*, 3 *Bingh.* 3.⁹ Where the action is

⁴ 13 Eng. Com. Law Reps. 432. ⁵ 14 Id. 433. ⁷ Id. 137. ⁸ 10 Id. 223.

⁶ 6 Id. 223. ⁹ 11 Id. 4.

brought on a proviso of re-entry in case of breach of covenant, and a particular of the breaches has been given, the proof must be according to the terms of the particular. *Doe v. Philips*, 6 T. R. 597. If brought on a forfeiture incurred by underletting, it is sufficient, *prima facie*, to prove a third person in possession of the premises, acting and appearing as the tenant, and the declarations of such person are said to be evidence. *Doe v. Rickarby*, 5 Esp. 4; *sed vide Doe v. Paine*, 1 Stark. 86.¹

Forfeiture waived.] Where the lease is *voidable*, and not void, the defendant may show that the forfeiture has been waived. A lease for lives is *voidable* only, though the condition be that the lease "shall be void." 1 *Saund.* 287, d (n). In a lease for years if the condition be, that the lease "shall be void," it is *voidable* only at the option of the lessor, *Doe v. Banks*, 4 B. and A. 401.² *Read v. Farr*, 6 M. and S. 121; so if the condition be, that "the lessor shall re-enter," the term is only voidable. *Pennant's case*, 3 Rep. 64, a. *Goodright v. Davids*, *Cowp.* 804. And where the proviso was, "that if the rent should be in arrear for twenty-one days after demand made, or if any of the covenants should be broken, then the term thereby granted, or so much thereof as should be then unexpired, should cease, determine, and be wholly void; and it should be lawful to and for the landlord upon the demised premises wholly to re-enter, and the same to hold for his own use, and to expel the lessee," it was held that the lease was voidable only, and not void, and that the landlord was bound to re-enter in case of forfeiture. *Arnsby v. Woodbradard*, 6 B. and C. 519.¹ Merely lying by and witnessing a forfeiture is not a waiver; *Doe v. Allen*, 3 Taunt. 78; but acceptance of rent accruing since the forfeiture, is a waiver; to constitute such waiver, the lessor must have notice of the forfeiture, which is a material and issuable fact. *Goodright v. Davids*, *Cowp.* 804. *Rowe v. Harrison*, 2 T. R. 430, 431. *Pennant's case*, 3 Rep. 64, b. So bringing an action of covenant for such rent is a waiver. *Roe v. Minshull*, B. N. P. 96; see S. C. *Scho. N. P.* 677. The lessor does not waive his right of re-entry by taking an insufficient distress for the rent, by the non-payment of which the lease became forfeited. *Brewer v. Eaton*, 3 Dougl. cited 6 T. R. 220. And where a lease contained a clause of re-entry in case the rent should be in arrear 21 days, and there should be no sufficient distress, Lord Ellenborough held that the landlord, having distrained within the 21 days, but continued in possession after, did not waive his right of re-entry. *Doe v. Johnson*, 1 Stark. 411.² If the breach be a continuing one, as the using rooms in a manner prohibited by the lease, the acceptance of rent after such user is not a waiver of

¹ 2 Eng. Com. Law Reps. 307. ² 6 Id. 462. ¹ 13 Id. 241. ² 2 Id. 448.

the forfeiture incurred by the subsequent continuing user. *Doe v. Woodbridge*, 9 B. and C. 376.*

Where a lease contained a general covenant to repair, and a covenant to repair upon three months' notice, Lord Ellenborough held that the landlord, by giving a notice "to repair forthwith," had not waived his right of re-entry for the breach of the general covenant. *Roe v. Paine*, 2 Campb. 520. But where a lease contained covenants to keep the premises in repair, and to repair within three months after notice, and a clause for re-entry for the breach of any covenant, and the premises being out of repair, the landlord gave a notice to repair within three months; it was held that this was a waiver of the forfeiture incurred by the breach of the general covenant to keep the premises in repair, and that the landlord could not bring ejectment until the expiration of the three months. *Doe d. Morecraft v. Meuz*, 4 B. and C. 606.* In *Doe v. Payne* the language of the notice was very different, the tenant was required to put the premises in repair *forthwith*; that did not prevent the landlord from bringing his ejectment at any time. *Per Bayley, J.*, *ibid.* 609; see *Doe v. Miller*, 2 C. and P. 348.*

In some cases the acts of the lessor may prevent the accruing of a forfeiture, as in the following case of an ejectment on forfeiture for breach of covenant, in a lease wherein the lessee covenanted to insure in the joint names of himself and the lessor, and in two-thirds of the value of the premises demised. The lessee had insured in his own name only, and, as contended, to a less amount than two-thirds the value of the premises. Both parts of the lease remained in the possession of the lessor, and an abstract only had been delivered by him to the lessee, which contained no mention that the insurance was to be in the joint names, though it stated that it was to be in two-thirds of the value of the premises. The lessor of the plaintiff had previously insured the premises at the same sum as the defendant. It was held that the conduct of the lessor being such as to induce a reasonable and cautious man to conclude that he was doing all that was necessary or required of him in insuring in his own name, and to the amount insured, he could not recover for a forfeiture, though there was no dispensation or release. *Doe v. Rowe*, 1 B. and M. 343.

The tenant may prevent the forfeiture by tendering the rent. "The statute is beneficial to the tenant as well as the landlord. It relieves the latter from the necessity of making a demand with all the precision required at common law, and the tenant incurs no forfeiture until the declaration in ejectment is served upon him; and if at that time he is ready to pay the rent, although he did not tender it when it was due, it gives him the same benefit as if he

* 17 Eng. Com. Law Reps. 399. • 10 Id. 417. • 12 Id. 163.

had tendered it at that time. *Per Holroyd, J. Doe v. Shawcross, 3 B. and C. 758.*¹ See *Co. Litt.* 202, *a*.

By Heir-at-Law.

Where the lessor of the plaintiff claims as heir-at-law, he must prove that the ancestor from whom he claims was actually seised of the lands, &c. ; or if he claim as heir to a remainderman, that the ancestor from whom he claims was the person in whom the remainder first vested by purchase. *Radcliffe's case, 3 Rep. 42, a. Walk. on desc.* 120. 2. That he is heir to such ancestor, and where he claims as heir to one in remainder, that the remainder has vested in possession.

Proof of seisin.] The seisin in fee may be proved by showing the ancestor in actual possession, or that he received rent from the person in possession, which is presumptive evidence of seisin in fee. *Co. Litt.* 15 *a. B. N. P.* 103. *Jayne v. Price, 4 Taunt.* 326, *ante, p.* 15. So proof of possession of the premises by the ancestor's lessee for years, is evidence of seisin, for the possession of tenant for years gives an actual seisin to the owner of the inheritance. *Co. Litt.* 243, *a. Bushley v. Dixon, 8 B. and C.* 298. So the possession of guardian in socage confers an actual seisin upon the infant. *Doe v. Newman, 3 Wils.* 516. Evidence of shooting and appointing a gamekeeper by the lord of a manor is not properly referable to a right of soil. *Per Bayley, J., Tyrwhitt v. Wynne, 2 B. and A.* 560. The declarations of a deceased tenant that he held under a particular person are admissible to prove the seisin of that person. *Uncle v. Watson, 4 Taunt.* 16.

Proof of descent.] The lessor of the plaintiff must prove that all the intermediate heirs between himself and the ancestor from whom he claims, are dead without issue. *Richards v. Richards, 15 East, 294 (n).* As to the presumption of the duration of life, *vide ante, p.* 18. If the lessor of the plaintiff claim as collateral heir, he must prove the descent of himself and the person last seised from a common ancestor, or at least from two brothers or sisters. *Doe v. Lord, 2 W. Bl.* 1100. Births, marriages, and deaths, may be proved by examined copies of entries in parish registers, and proof of the identity of the persons therein named, and of the parties in question. *Ante, pp.* 62, 114. The herald's books, *ante, p.* 113, declarations of deceased members of the family, *ante, p.* 20, descriptions in family bibles, memorandums by members of the family, recitals in family deeds, monumental inscriptions, inscriptions on rings, old pedigrees hung up in family mansions, and the like, are admissible to prove a pedigree. *Ibid.* In proving a marriage it is not necessary in the first instance to give evidence of the regular

¹ 10 Eng. Com. Law Reps. 223. 10 Id. 85.

publication of the banns, or of the regularity of the license, for the presumptive proofs of marriage have not been taken away by the marriage act. *Devereux v. Much Dew Church*, 1 W. Bl. 367. And since that act a marriage may be proved by reputation as well as before. *Reed v. Passer, Peake*, 233; or by the presumption arising from cohabitation. *B. N. P.* 114. Even where the parents are alive, reputation is sufficient evidence of the marriage in ejectment by the son. *Doe v. Fleming*, 4 Bingh. 266.^{*} Either of the married parties, provided they be not interested, is competent to prove or disprove the marriage. *Goodright v. Moss, Cowp.* 593. As to Fleet marriages, see *ante*, p. 114.

The declarations of a relative are not evidence when the relative himself can be produced, *Penderell v. Penderell*, 2 Str. 925; and declarations made after a suit commenced, or a controversy preparatory to one, cannot be admitted. *Berkeley peerage case*, 4 Campb. 401, *ante*, p. 20.

Defence.

Illegitimacy.] The defendant may prove the marriage void by a prior marriage, want of age, want of reason, or the non-observance of the solemnities required by the marriage act. 2 Phill. Ev. 235. The marriage of a minor by license without the consent of the father is good, the 4 Geo. IV. c. 75, s. 16, being directory only. *R. v. Inhab. of Birmingham*, 8 B. and C. 29.^{*} But by s. 22, if any person shall knowingly and wilfully intermarry in any other place than a church, or such public chapel wherein banns may be lawfully published, unless by special license, or shall knowingly and wilfully intermarry without due publication of banns or license from a person or persons having authority to grant the same first had and obtained, or shall knowingly and wilfully consent to or acquiesce in the solemnization of such marriage by any person not being in holy orders, the marriages of such persons shall be null and void. To prove the illegitimacy of a child, want of access, or any other circumstances which tend to show that the husband could not, in the course of nature, have been the father of his wife's child, are good evidence. *R. v. Luffe*, 8 East, 206; and presumptive evidence of non-access is admissible. *Goodright v. Saul*, 4 T. R. 356. Whenever a husband and wife are proved to have been together at a time when, in the order of nature, the husband might have been the father of the child if sexual intercourse did then take place, such sexual intercourse is *primâ facie* to be presumed, and it is incumbent on those who dispute the legitimacy of the child to disprove the fact of sexual intercourse having taken place by evidence of circumstances which afford an irresistible presumption that it could not have taken place, and not by mere evidence of circumstances which may afford a balance of pro-

^{*} 13 Eng. Com. Law Repts. 426. ^{*} 15 Id. 154

babilities against the fact, that sexual intercourse did take place. *Per Sir J. Leach, M. R. Head v. Head*, 1 Sim. and Stu. 152, S. C. affirmed, 1 Turner, 139, see the *Banbury peerage case*, 1 Sim. and Stu. 153, *Morris v. Davies*, 3 C. and P. 218, 427.* In case of a separation *a mensa et thoro*, the children born during that period will be bastards unless access be proved. *St. George and St. Margaret*, 1 Salk. 123. A wife will not be permitted to prove the non-access of her husband, but she is competent to prove the fact of her connexion with the person whom she charges as being the real father of her child. *R. v. Luffe*, 8 East, 203.

By Devisee of Freehold Interest.

Where the lessor claims a freehold interest by devise, he must prove: 1. The seisin of the testator, *vide ante*, p. 343. 2. The regular execution of the will, *vide ante*, p. 72; and in case there are any estates limited by the will prior to the devise to himself, the determination of such estates. 3. The death of the testator.

Where the devisee of an estate refused to take it, saying she was entitled as heir-at-law, and would not accept any benefit by the will of the devisor, it was held that this was not such a disclaimer as prevented her from afterwards bringing ejectment, and relying on her title as devisee. *Doe v. Smyth*, 6 B. and C. 112.†

Defence.

The defendant may impeach the will, either by showing that it is a forgery, or by proving the incapacity of the testator to make a will. This incapacity may arise either from coverture or infancy. *Stat. 34, 35, H. VIII. c. 5, s. 14*; or from idiocy, or non sane memory. *Ibid. the Marquis of Winch. case*, 6 Rep. 23, a. So it may be shown that the will was made under duress, or obtained by fraud. *Doe v. Allen*, 8 T. R. 147.

Will void from idiocy, or non sane memory.] It is not enough that the testator, when he makes his will, should have sufficient memory to answer familiar and usual questions, but he ought to have a disposing memory, so as to be able to make a disposition of his lands with understanding and reason. *Marquis of Winch. case*, 6 Rep. 23, a. If the defendant succeed in proving that the testator has been affected by habitual derangement, then it is for the other party who claims under the will, to show sanity and competency, at the period when the act was done. *Atty-Gen. v. Parnther*, 3 Br. C. C. 441. 1 *Phillim*. 100.

Revocation of will by subsequent will.] The defendant may show

* 14 Eng. Com. Law Reps. 275. 378. † 13 Id. 113.

the will revoked "by some other will or codicil in writing," according to the 6th sect. of the statute. Such second will, to operate as a revocation, must be executed according to the requisitions of the 5th section of the statute. See *ante*, p. 73. *Ecclestone v. Speake*, Carth. 80. If the second devise do not expressly revoke, it revokes only as far as is clearly inconsistent with the former devise. *Harwood v. Goodright*, Cowp. 87.

Revocation of will by other writing.] By the 6th sect. of the statute of frauds a will may be revoked "by some other will or codicil in writing, or other writing of the deviser, signed in the presence of three or four witnesses, declaring the same." This statute does not require the witnesses to subscribe or attest the writing in the presence of the deviser, or indeed to subscribe it at all. *Townsend v. Pearce*, 8 Vin. Ab. Devise, p. 142.

Revocation of will by cancelling, &c.] By the same section of the statute a will may be revoked "by burning, cancelling, tearing, or obliterating the same by the testator himself, or in his presence, and by his directions and consent." The act must be done with an intention of revoking, and though the burning or tearing be partial or incomplete, yet if done with an intention to revoke, it will operate as a revocation. *Bibb v. Thomas*, 2 W. Bl. 1043, *Winsor v. Pratt*, 2 B. and B. 650.* It is a question of fact for the jury, whether the testator had completed the intended act of revocation. *Doe v. Perks*, Gow, 193. The declarations of the testator at the time of doing the act, and his subsequent declarations respecting it, are admissible. *Burtenshaw v. Gilbert*, Cowp. 53, 2 East, 534 (b).

Implied revocations.] The subsequent marriage of the testator, and the birth of a child, without provision made for them, operate as an implied revocation. *Doe v. Lancashire*, 5 T. R. 58. It seems doubtful whether parol evidence is admissible to rebut an implied revocation. In *Lugg v. Lugg*, 1 Ld. Raym. 441, it is said, that if by any expression, or any other means, it had appeared that it was the testator's intention that his will should continue in force, the marriage and birth of issue would not have been a revocation. So in *Brady v. Cubitt*, Dougl. 31, such evidence was considered admissible by three of the judges; and it is the practice of the ecclesiastical courts to receive it. *Emmerson v. Boville*, 1 Phillim. 342,† *Holloway v. Clarke*, Id. 339,‡ *Johnson v. Johnson*, Id. 468.⁴ See also *Goodtitle v. Otway*, 2 H. Bl. 522. But on the other hand Lord Alvanley expressed doubts as to the admissibility of such evidence. *Gibbons v. Caunt*, 4 Ves. 848, which were likewise entertained by the Lord Chancellor in *Kenebel v. Scrafton*,

* 6 Eng. Com. Law Reps. 299.

† 1 Eng. Eccles. Reps. 95. ‡ 1 Id. 93. ⁴ 1 Id. 141.

5 *Ves.* 663, 2 *East*, 538, S. C. See also *Doe v. Lancashire*, 5 *T. R.* 60.

By Devisee of Leasehold Interest.

A devisee of leasehold interest must prove: 1. The execution of the lease by the lessor, or if the testator was an assignee, the execution of the lease and the assignment to him: 2d. The probate of the will; and, 3. The assent of the executor to the bequest. By the assent the term is vested in the devisee from the death of the testator. *Saunders's case*, 5 *Rep.* 12, b. *Doe v. Grey*, 3 *East*, 120. A very small matter shall amount to an assent, it being a rightful act. *Noel v. Robinson*, 1 *Vern.* 94.

By Devisee of Copyhold.

A devisee of copyhold premises must prove: 1. The admittance of the testator: 2. The will, and in cases not within stat. 55 Geo. III. c. 192, which dispenses with such surrender, a surrender to the use of the will: 3. His own admittance. *Roe v. Hicks*, 2 *Wils.* 15. A will to pass copyholds need not be signed with the same solemnities as a devise of freehold lands; a draft of, or instructions for a will, have been held sufficient to direct the uses of a surrender. *Carey v. Askew*, 2 *Br. C. C.* 319, *Doe v. Danvers*, 7 *East*, 299, 324.

Admittance.] Although in ejectment against a stranger, the heir of a copyholder, *Doe v. Hellier*, 5 *T. R.* 169, *Roe v. Hicks*, 2 *Wils.* 13, or the grantee of the reversion of a copyhold from the lord, *Doe v. Loneless*, 2 *B. and A.* 453, need not prove an admittance, yet a devisee, being a purchaser, must prove his admittance. The admittance of tenant for life being the admittance of him in remainder, *Auncelme v. Auncelme*, *Cro. Jac.* 31, a devisee in remainder has only to prove the admittance of the tenant for life, and not his own admittance. The title of a surrenderee is not complete before admittance, which he must prove; but after admittance, his title has relation to the time of surrender against all persons but the lord; and he may therefore recover in ejectment upon a demise laid between the time of the surrender and admittance, provided the admittance be before the trial. *Holdfast v. Clapham*, 1 *T. R.* 600, *Doe v. Hall*, 16 *East*, 208. The surrender and admittance may be proved by the original entries on the court-rolls of the manor, or by copies of the court-rolls of the admittance and surrender properly stamped, *Doe v. Hall*, 16 *East*, 208, with evidence of the identity of the parties admitted. *Doe v. Smith*, 1 *Campb.* 197, and see *Doe v. Callaway*, 6 *B. and C.* 484,* *ante*, p. 59.

* 13 *Eng. Com. Law Reps.* 238.

By Mortgagee.

If the action be brought against the mortgagor in possession, the mortgagee has only to prove the execution of the mortgage-deed, and a demand of possession is unnecessary. *Doe v. Maisey*, 8 B. and C. 767,¹ *Doe v. Giles*, 5 Bingh. 420,² ante, p. 66; but if a third person is in possession, the plaintiff must show a title to oust him. Thus if he be a tenant from year to year, who came in prior to the mortgage, the lessor of the plaintiff must prove the tenancy, and a regular notice to quit. *Thunder v. Belcher*, 3 East, 449; but if the tenant came in subsequently to the mortgage, and has not been acknowledged as tenant by the mortgagee, it will be sufficient to show that his interest was created subsequently to the title of the lessor of the plaintiff, without proving any notice to quit. *Keech v. Hall*, Dougl. 21.

By Tenant by Elegit.

Tenant by elegit must prove the judgment, the elegit taken out upon it, and the inquisition and return thereupon; and for this purpose an examined copy of the judgment roll, containing the award of elegit, and the return of the inquisition, is sufficient without proving a copy of the elegit and of the inquisition. *Ramsbotham v. Buckhurst*, 2 M. and S. 565. If the sheriff's return do not state that he has set out a moiety *by metes and bounds*, it is bad, and the objection may be taken at the trial. *Masters v. Durrant*, 1 B. and A. 40. If a third person be in possession, the lessor of the plaintiff must prove not only his own title, but also that of the debtor under whom he claims. 2 Phill. Ev. 252. In ejectment for lands, the lease of which had been taken in execution under a *fi. fa.* against the termor, it was held that the lessor of the plaintiff, who was plaintiff in the former action, and to whom the sheriff had assigned the lease, was bound not only to prove the *fi. fa.* but also the judgment. *Doe v. Smith*, Holt, 589,³ 2 Stark. 199, S. C. But where the lessor of the plaintiff was not the plaintiff in the first action, it was held sufficient for him, in ejectment against the defendant in the first action, to produce the *fi. fa.* without proving the judgment. *Doe v. Murless*, 6 M. and S. 110.

By Conusee of Statute Merchant or Staple.

In ejectment by the conusee of a statute merchant against the conusor, the lessor of the plaintiff must prove the obligation of the conusor; or in case the obligation has been lost or damaged, a true copy from the roll in the custody of the clerk of recognizances, or his deputy, made and signed by him or his deputy, and duly proved; and in the next place the writ of extent. An examined copy of the writ of *capias si laicus* does not appear to be

¹ 15 Eng. Com. Law Reps. 335. ² 15 Id. 485. ³ 3 Id. 189, 312.

necessary, as it is recited in the writ of extent. If a third person, and not the conusor, be in possession, in addition to these proofs evidence must be given of the conusor's title. 2 *Phill. Evid.* 253.

In ejectment by the conusee of a statute staple, he must produce and prove: 1. The bond of the conusor, or in case of its loss or damage, a true copy from the roll in the custody of the clerk of recognizances, or his deputy, made and signed by him or his deputy, and duly proved: 2. The writ of *liberate*; but proof of the writ of extent appears not to be necessary, as it is recited in the *liberate*. If a third person be in possession proof of the conusor's title will also be required. 2 *Phill. Ev.* 254.

By Guardian.

In ejectment by guardian in socage the lessor of the plaintiff must prove the seisin of the ancestor of the heir, that he has left an heir at law who is under the age of fourteen, and that among the relations to whom the inheritance cannot descend, he himself is the next of blood to such heir. It seems necessary to prove that the heir was under the age of fourteen at the time of the demise laid in the declaration. 2 *Phill. Ev.* 250. *Doe v. Bell*, 5 T. R. 471. In ejectment by a guardian appointed by deed or will, according to 12 Car. II. c. 24, s. 8, 9, the title of the deceased father must be proved, the minority of the ward at the time of the demise laid in the declaration, and the due execution of the will or deed. 2 *Phill. Ev.* 251.

By Executor or Administrator.

In ejectment by an administrator the lessor of the plaintiff must prove, 1. The lease to his intestate; and, 2. The intestate's death and the letters of administration, or a copy of the entry in the book of acts, *Davis v. Williams*, 13 East, 232, B. N. P. 246, ante, p. 60; or the certificate of administration granted by the ecclesiastical court. *Kempton v. Cross*, Rep. temp. Hardw. 108. Administration when granted relates back, as it seems, to the intestate's death. *Com. Dig. Administration* (B. 10); but see post, "*In Trover*." And the lessor of the plaintiff may therefore recover on a demise laid between the time of the intestate's death and the grant of administration.

An executor must prove the lease to his testator and produce the probate. The term is vested in the executor from the death of the testator, and the executor may therefore recover on a demise laid between the time of the testator's death and of the probate. *Com. Dig. Administration* (B. 10).

By Parson.

In ejectment by a parson for the recovery of the parsonage-house, glebe, or tithes, he must show his title by proving his presentation, institution, and induction, which is sufficient without proof of title in the patron. *Heath v. Pryn*, 1 Vent. 14, B. N. P. 105. If the presentation was by parol, it may be proved by a person who was present and heard it. *R. v. Eriswell*, 3 T. R. 723, 2 Phill. Ev. 256. But a presentation by a corporation must be in writing under the common seal. *Gib. Codex*, 794. The institution may be proved by the letters testimonial of institution, or by the official entry in the public registry of the diocese, which ought regularly to record the time of the institution, and on whose presentation, *ibid.* 813, in which case it would seem to be evidence of the presentation as well as of the institution. 2 Phill. Ev. 257. So the letters of institution of a party, reciting the cession of his predecessor, followed by induction, are sufficient evidence of the cession. *Doe v. Carter*, 1 R. and M. 238. The induction may be proved, either by some person who was present at the ceremony, or by the indorsement on the archdeacon, or by the return to the mandate, if a return has been made. 2 Phill. Ev. 257. *Chapman v. Beard*, 3 Anst. 942. The lessor of the plaintiff will not be required to prove that he has taken the requisite oaths, or declared his assent to the book of common prayer, according to the act of uniformity. *Powell v. Millbank*, 2 W. Bl. 851, 3 East, 199. Some evidence must be given that the property to be recovered is church property, as that the premises were occupied by a former incumbent, &c. 2 Phill. Ev. 258.

Competency of Witnesses.

The tenant in possession is not a competent witness to support his landlord's title, *Doe v. Williams*, Cowp. 621; and where the lessor of the plaintiff has proved a *prima facie* possession in the defendant, a third person will not be allowed to prove that he is himself tenant in possession. *Doe v. Wilde*, 5 Taunt. 183,* *Doe v. Bingham*, 4 B. and A. 672. Where both parties claim as lessees under the person who is produced as a witness, and the question is, whether he demised first to the lessor of the plaintiff or to the defendant; if the leases were granted without reservation of rent, he will, as it seems, be a competent witness; but if the contending parties are to pay rent in different rights, he will not be allowed to prove either lease. *Fox v. Swann*, *Styles*, 482. *Bell v. Harwood*, 3 T. R. 310. An heir apparent is a good witness in ejectment for the land, but not so a remainderman, for he has a present interest in the land. *Smith v. Blackham*, 1 Salk. 283. *Doe v. Tyler*, 6 Bingh.

* 1 Eng. Com. Law Reps. 68. '6 Id. 560.

390. An executor who takes a pecuniary interest under a will is competent to support it, for the verdict will only have the effect of establishing the will as to the real property. *Doe v. Teague*, 5 B. and C. 335.^a So a grantee who is a bare trustee is competent to prove the execution of a deed to himself. *Goss v. Tracey*, 1 P. Wms. 287, 290; see *ante*, p. 85. Where a witness on the *voir dire* stated that the lessor of the plaintiff had formerly assigned to him the premises in question for a particular purpose, but that he had given up the deed to the lessor of the plaintiff, and had never had possession, he was held incompetent. *Doe v. Bragg, R. and M.* 87.

Defence.

The defendant, by way of defence, may show the title in himself or a third person, or that the lessor of the plaintiff has no right of entry. Thus he may prove the creation and existence of an outstanding term, though vested in a trustee for the lessor of the plaintiff, unless the circumstances are such that a surrender can be presumed, *ante*, p. 325. The entry of the lessor of the plaintiff may be taken away by the statute of limitations, by disseisin and descent, or by discontinuance.

Where a party defends an ejectment as landlord, and the occupiers of the premises have suffered judgment by default, he cannot object that the occupiers have not received notice to quit from the lessors of the plaintiff. *Doe v. Creed*, 5 Bingh. 327.¹

Entry barred by the statute of limitations.] In order to render the statute of limitations a bar in ejectment, the defendant must prove an adverse possession for twenty years. There is no adverse possession in the following cases: 1. Where the possession of the party in possession is the possession of the lessor of the plaintiff, as where a younger son enters by abatement on the death of his father, and dies seised, this possession is not adverse to the title of his elder brother. *Co. Litt.* 243, *a*. So the possession of one coparcener, jointenant, or tenant in common, is not adverse to the title of his co-tenant. *Ford v. Grey*, 6 Mod. 44. See *Doe v. Halse*, 3 B. and C. 757;^a unless there has been an actual ouster, *ante* p. 329. 2. There is no adverse possession where the estate of the party in possession, and that of the lessor of the plaintiff, form parts of one and the same estate. Thus the possession of the particular tenant is never adverse to the title of him in remainder or reversion. *Taylor v. Horde*, 1 Burr. 60. *Fisher v. Prosser*, Cowp. 218. See also *Doe v. Brightwen*, 10 East, 583. Where the relation of landlord and tenant can be implied, the statute will not run, *Roe v. Ferrars*, 2 B. and P. 542; nor where the party in

^a 19 Eng. Com. Law Reps. 111. ^b 11 Id. 248. ^c 15 Id. 459. ^d 10 Id. 224.

possession is tenant at sufferance. *Doe v. Hull*, 2 D. and R. 38.¹ 3. There is no adverse possession where the relation of trustee and *cestui que trust* subsists between the parties. *Keene v. Deardon*, 8 East, 248.

Where interest has been paid upon a mortgage, it will prevent the statute from running against the mortgagee, though he has been out of possession for more than twenty years, for the payment of interest is conclusive evidence of a continuing tenancy between the mortgagor and mortgagee. *Hatcher v. Fineux*, 1 Ld. Raym. 740. *Hall v. Doe*, 5 B. and A. 390.^a

If a cottage be built on the lord's waste in defiance of him, twenty years undisturbed possession of such cottage, will be a bar to the lord; but if built at first with the lord's permission, or if any acknowledgment have been since made, the statute will not run. Thus where the defendant had inclosed a small piece of waste land by the side of a highway, and had occupied it for thirty years without paying any rent, but at the expiration of that time, the owner of the adjoining land demanded 6*d.* rent, which the defendant paid on three several occasions, it was held that these payments, in the absence of other evidence, were conclusive to show that the defendant's occupation began by permission, and that the owner of the adjoining land was entitled to recover. *Doe v. Wilkinson*, 3 B. and C. 413.^a In a similar case, after a possession of upwards of twenty years, the lord demanded and obtained possession, which was reluctantly given; and the occupier was told, that if he resumed possession, it would only be during pleasure. He did resume possession, and remained in for fifteen years more; and though he never paid any rent, it was held that this was not necessarily an adverse possession, but might be presumed to have commenced with the lord's permission. *Doe v. Clark*, 8 B. and C. 717.^c It appears not to be decided whether twenty years' possession of premises, which a tenant has gained by encroachment on the lord's waste, will be a bar in an ejectment brought for such premises by his lessor, after the expiration of the tenancy. Penryn B., and Heath and Buller, justices, are said to have ruled that the lessor was entitled to recover; see *Doe v. Davies*, 1 Esp. 461; and Graham B., ruled the same way, *Bryan v. Winwood*, 1 Tawnt. 208; while Lord Kenyon has laid it down as clear law, that if a tenant inclose part of a waste, and is in possession thereof so long as to acquire a possessory right to it, such inclosure does not belong to the landlord; but if the tenant has acknowledged that he held such inclosed part of his landlord, this would make a difference. *Doe v. Mulliner*, 1 Esp. 460. Thompson B., also inclined to the same opinion, but refused to non-suit the landlord, out of deference to the authorities cited for the plaintiff. *Doe v. Davies*, 1 Esp. 461; and see *Attorney Gen. v. Fullerton*, 2 Ves. and Beames, 263.

When the statute has once begun to run, no subsequent dis-

¹ 16 Eng. Com. Law Reps. 69. ^a 7 Id. 232. ^c 10 Id. 135. ^d 15 Id. 331.

ability will stop its operation. The saving clause only extends to the persons to whom the right first descends. *Doe v. Jones*, 4 T. R. 310. It was held in *Doe v. Jesson*, 6 East, 80, that the word death in the saving clause of the statute referred to the death of the person to whom the right first accrued, and who died under disability, and that the heir, though under disability, must enter within ten years from that time, but in a later case the court of C. P. were of opinion that the heir has ten years, after his own disability ceases; *Cotterell v. Dutton*, 4 Taunt. 826; which is said to be the construction invariably adopted in practice. *Sugd. V. and P.* 334. If an estate descends to parceners, one of whom is under a disability, which continues more than twenty years, and the other does not enter within twenty years, the disability of the one does not preserve the title of the other, after the twenty years elapsed. *Doe v. Rowlston*, 2 Taunt. 441.

Right of entry barred by disseisin and descent cast.] The defendant may prove that the entry of the lessor of the plaintiff is barred by a disseisin, by the peaceable possession of the land for five years next after such disseisin, according to statute, 32 H. VIII. c. 33, and by a descent cast. He must prove a wrongful ouster of the party, by entry, and expressly claiming the freehold, or taking the profits. *Anon.* 1 Salk. 246. He must prove such an act that an intention to disseise may be inferred from it. *Blunden v. Baugh*, Cro. Car. 304. *Jerrett v. Weare*, 3 Price, 575. *Williams v. Thomas*, 12 East, 141. There are many cases in which a descent cast will not toll an entry, as in case of incorporeal hereditaments. *Co. Litt.* 237, a. So where the ancestor and heir are not seised of the same estate. *Ibid.* 238, b. Escheat and succession have not the effect of a descent. *Ibid.* 239, b. 250, a. The entry is not tolled where the descent is not immediate, as where a tenancy by the curtesy intervenes. *Litt. s.* 394. So where the descent has been avoided, as by the seisin of a dowress. *Ibid. s.* 393. So where the party who has the right was an infant at the time of the descent, *ibid. s.* 402; or a feme convert, *ibid. s.* 403; or non compos, *ibid. s.* 405; nor is it tolled in the case of a devisee; *Co. Litt.* 240, b; nor in case of a condition broken, *ibid.* 339, b; nor is the entry of tenant for years, *Litt. s.* 411; or other person having a chattel interest; *Co. Litt.* 249, a; tolled by a descent cast.

Right of entry barred by discontinuance.] If the action is brought by tenant in tail, or by one in remainder or reversion after an estate tail, the defendant may show that the estate tail has been discontinued, which has the effect of taking away the entry of the tenant in tail, remainderman or reversioner. *Co. Litt.* 323, a. In order to prove a discontinuance the defendant must show that the party dis-

continuing, was tenant in tail in possession. *Litt. s. 656, Doe v. Jones*, 1 B. and C. 238.* He must then prove in the usual manner the instrument by which the discontinuance was created, whether a feoffment, fine, common recovery, or release or confirmation with warranty. *Co. Litt. 325, a.*

Execution.

By stat. 1 W. 4, c. 70, s. 38, the judge is authorised in all cases of trials of ejectments, where the verdict shall pass for the plaintiff, or he shall be non-suited for want of the defendant's appearance to confess lease, entry, and ouster, to certify on the back of the record that a writ of possession ought to issue immediately, and such writ shall thereupon issue.

REPLEVIN.

THE evidence in the action of replevin varies according to the nature of the issue joined.

In some cases the defendant is allowed by statute to plead not guilty, or, in a general form, that the matter complained of was done under the authority of an act of parliament, and to give the special matter in evidence under such plea; as by 43 Eliz. c. 2, s. 19, in the case of poor-rates, and by 23 Hen. VIII. c. 5, s. 11, in the case of sewers' rates. 1 *Saund.* 347, c (n).

Evidence on non cepit.] The place in which the goods are alleged in the declaration to have been taken is material and traversable. *Weston v. Carter*, 1 Sid. 10. And the plea of *non cepit*, that the defendant did not take the cattle, &c., is termed the general issue in replevin. It lies upon the plaintiff to prove this issue, and if found for the defendant it merely excuses him from damages, but does not entitle him to a return. It is sufficient for the plaintiff upon this issue to show that the defendant had the goods in his possession in the place in which, &c., for the wrongful taking is continued in every place in which he afterwards detains them. *Walton v. Kersop*, 2 Wils. 354. If in fact the defendant neither took the cattle in the place named, nor had them there afterwards, he should plead *cepit in alio loco*, and entitle himself to a return by adding an avowry or cognizance, which in that case is not traversable. *Anon.* 1 Vent. 127, B. N. P. 54.

Avowry.] The defendant usually avows or makes cognizance, in order to obtain a return of the goods, to which avowry or cognizance the plaintiff pleads in bar. The proofs under the most usual pleas in bar will be stated.

Where the distress has been for rent, it is enacted by 17 Car. II. c. 7, s. 2, that in case the plaintiff shall be non-suited after cognizance, or avowry made, and issue joined, or if a verdict shall be given against the plaintiff, then the jurors who were empanelled or returned to inquire of such issue, shall at the prayer of the defendant inquire *concerning the sum of the arrears, and the value of the goods or cattle distrained*; and thereupon the avowant, or he that makes cognizance, shall have judgment for such arrearages, or so much thereof as the goods or cattle distrained amount unto, &c. The avowant, therefore, must be prepared to prove both the amount of the rent in arrear and the value of the goods or cattle taken, and the omission of this inquiry cannot be supplied by a writ of inquiry; *Sheape v. Culpepper*, 1 Lev. 255, 1 Saund. 195, b (n); though the defendant may have the common law judgment for a return. *Rees v. Morgan*, 3 T. R. 349.

If the defendant avows for rent and that the goods were fraudulently removed, &c., under 11 Geo. II., and the plaintiff pleads in bar no fraudulent removal, the defendant must show that there was no sufficient distress on the premises. *Parrey v. Duncan*, 1 M. and M. MSS.

Evidence on plea of non demisit or non tenuit.] To an avowry for rent-arrear, the plaintiff usually pleads *non demisit* or *non tenuit*, upon which issue the defendant must prove the demise as stated in his avowry. He must prove a *demise*, and therefore if he only shows an agreement for a lease, it is insufficient. *Dunk v. Hunter*, 5 B. and A. 322.* But though the plaintiff enters upon the land under an agreement for a lease, in which the amount of the rent is not stated, yet if he occupies and pays rent, he becomes tenant from year to year at that rent, and an avowry, stating the terms of the tenancy accordingly, will be sufficient. *Knight v. Bennet*, 3 Bingh. 361.† So if, entering under such an agreement he acknowledges half a year's rent to be due, *Cox v. Bent*, 5 Bingh. 185.‡ *supra*; and see *Saunders v. Musgrove*, 6 B. and C. 524.¶ The terms of the tenancy must be proved as laid, and therefore if the rent reserved was higher than the rent stated, it is a fatal variance, for the contract must be truly stated. *Brown v. Sayce*, 4 Taunt. 320. But where the defendant avowed for taking growing corn in four closes, and stated that the plaintiff held the closes in which, &c., at a certain yearly rent, and it appeared that he also held two other closes at that rent, this was decided to be no variance, for every part of the land was liable to the whole rent. *Hargrave v. Shewin*, 6 B. and C. 34, 9 D. and R. 20, S. C.; and see *Page v. Chuck*, 10 B. Moore, 264, *Philpott v. Dobbinson*, 6 Bingh. 104.¶ The defendant cannot under an avowry for double

* 7 Eng. Com. Law Reps. 115. † 13 Id. 2. ‡ 15 Id. 410. § 13 Id. 243.

¶ 13 Id. 102. † 17 Id. 142. ‡ 19 Id. 18.

rent under the statute 11 Geo. II. c. 19, s. 18, recover any single rent. *Johnstone v. Huddleston*, 4 B. and C. 938.*

As the plea of *nil habuit in tenementis* is a bad plea to an avowry for rent arrear, *Sullivan v. Stradling*, 2 Wils. 208, the plaintiff is not allowed to give in evidence under *non demisit*, or *tenuit*, any matter amounting to *nil habuit in tenementis*, not even though the title of the avowant be founded in fraud, *Parry v. House*, Holt, 489,† for a tenant shall not be allowed to dispute the title of his landlord, *ante*, p. 142. But where the plaintiff come in under another person and not under the defendant, but had paid rent to the defendant in ignorance of a defect in his title, the Court of Common Pleas held that the plaintiff might show the want of title in the defendant. *Rogers v. Pitcher*, 6 Taunt. 209.‡ *Gregory v. Doidge*, 3 Bingh. 474.‡ So under the plea of *non tenuit* the plaintiff may show that the defendant's title expired before the rent became due, *Gravenor v. Woodhouse*, 1 Bingh. 38,§ and he may show his landlord's title expired, though he has paid rent to him after such expiration, provided the rent was paid in ignorance of the landlord's title. *Fenner v. Duplock*, 2 Bingh. 10.‡ Land belonging to a parish was occupied by A., who paid rent to the churchwardens. The latter executed a lease of the land for a term of years to B., and gave A. notice of the lease. It was held that A. was not estopped by having paid rent to the churchwardens from disputing B.'s title, and that the latter could not derive a valid title from the churchwardens. *Phillips v. Pearce*, 6 B. and C. 433,¶ 8 D. and R. 43, S. C. It is no variance under *non tenuit* if it appear that the plaintiff held for a less time than that stated in the avowry. *Forty v. Imber*, 6 East, 434.

[*Evidence on plea in bar of riens in arrear.*] The plea in bar of *riens in arrear*, which lies upon the plaintiff, admits the demise as stated in the avowry. Therefore, where to an avowry for rent due upon a *quarterly* holding, the plaintiff pleads *riens in arrear*, he cannot show that the holding is *half-yearly*, and that consequently no rent had accrued, though one of the quarters had elapsed. *Hill v. Wright*, 2 Esp. 669. It will not be sufficient to support this plea to show that *part* of the rent has been satisfied, for the defendant will be entitled to a verdict if it appear that any part of the rent is in arrear, *Cobb v. Bryan*, 3 B. and P. 348. The plaintiff may, as it seems, under this plea, show that he has paid the rent to a superior landlord under threat of a distress, for such payment seems to be in law a payment to the immediate landlord, so as to leave no rent in arrear. *Taylor v. Zamira*, 6 Taunt. 524.‡ *Sapsford v. Fletcher*, 4 T. B. 513, where the defence was specially pleaded. But see 2 Phill. Ev. 180. The payment is no less compulsory though the ground-landlord has allowed the occupier time to pay.

* 10 Eng. Com. Law Reps. 471. † 3 Id. 167. ‡ 1 Id. 355. § 13 Id. 58.

¶ 8 Id. 235. † 9 Id. 294. ‡ 11 Id. 264. § 1 Id. 472.

Carter v. Carter, 5 *Bingh.* 406.^c So where a demand in respect of interest on a mortgage affecting the premises is paid with the defendant's assent, the plaintiff may avail himself of the payment under this plea. *Dyer v. Bowley*, 2 *Bingh.* 94 ;^e and see *Pope v. Biggs*, 9 *B. and C.* 245.^b Where the plaintiff pleads *non tenuit* and *riens in arrear*, and the first issue is found for him, the second issue becomes immaterial, and the proper course is to discharge the jury from finding any verdict upon it. *Cassey v. Diggon*s, 2 *B. and A.* 546.

Evidence on traverse of being bailiff.] If the plaintiff traverses that the defendant is bailiff, as stated in the cognizance, the defendant must prove his authority to make the distress, and a recognition of this act will be equivalent to a previous command. *Trevillian v. Pine*, 11 *Mod.* 112. 1 *Saund.* 347, d (n). One jointenant or coparcener has an authority in law without any express command, to distress as bailiff of his co-tenant. *Leigh v. Shepherd*, 2 *B. and B.* 466.¹

Evidence where the defendant avows taking the cattle damage feasant.] Where the defendant avows taking the cattle damage feasant, he may plead that the *locus in quo* is his soil and freehold, which the plaintiff may deny, and the evidence in such case will be the same as under the plea of *liberum tenementum* in trespass *quare clausum fregit*. *Vide post*. So the plaintiff may plead in bar defect of fences, which the defendant was bound to repair, whereby the cattle escaped ; a right of common way, &c. So the plaintiff may plead tender of amends before the distress, which makes the taking wrongful. *Com. Dig. Pleader*, (3 K. 23).

Evidence on plea of tender.] To an avowry for rent the plaintiff may plead a tender of the rent: to an avowry for damage feasant a tender of amends. A tender before distress makes the taking unlawful: after distress, and before impounding, the detention unlawful. *Six carpenter's case*, 8 *Rep.* 146, b. Although it has been held that a tender of amends to a mere bailiff is not good; *Pilkington's case*, 5 *Rep.* 76. 1 *Brownl.* 173; yet if the bailiff is the avowant's usual receiver, or if it appear from other circumstances that he is his agent for that purpose, the tender to him is good. *Gilb. Rep.* 89, *Browne v. Powell*, 4 *Bingh.* 230.^a But a tender to him is bad if the avowant is present; *Gilb. Rep.* 89; and so is a tender to one deputed by the bailiff, *Pimm v. Grevill*, 6 *Esp.* 95.

Competency of witnesses.

The declarations of a person under whom the defendant makes cognizance, are not, it has been ruled, evidence for the plaintiff

^c 15 Eng. Com. Law Repts. 479. ^e 9 Id. 333. ^b 17 Id. 368. ^a 6 Id. 203.

¹ 13 Id. 410.

Hart v. Horn, 2 Campb. 92; but see ante, p. 28. But such declarations should seem to be evidence, for if such person should be produced as a witness for the defendant making cognizance, he would be incompetent. *Golding v. Nias*, 5 Esp. 273. Thus in replevin by an under-tenant against the superior landlord who distrains as bailiff of his immediate tenant, the latter is not a competent witness to prove the amount of rent due from the under-tenant. *Upton v. Curtis*, 1 Bingh. 210.¹ 8 B. Moore, 52, S. C.

The sureties in the replevin bond are incompetent witnesses for the plaintiff. *Bailey v. Bailey*, 1 Bingh. 92.²

The defendant avowed that the plaintiff and one J. B. held the *locus in quo* as tenants to the defendant, &c. upon which issue was joined. At the trial some evidence was given by the defendant that the plaintiff and J. B. were in possession of the premises in question, and also that a lease had been executed to them by defendant's ancestor, which the plaintiff and J. B. had paid for, but had refused to execute. It was not proved that J. B. was so connected with the plaintiff, as to the premises in question, as to be jointly liable for the rent; nor was it shown that the goods distrained were the joint property of the plaintiff and J. B. The plaintiff tendered J. B. as a witness, who was rejected without being examined on the *voir dire* as to his liability to the rent. It was held that he was not an incompetent witness until that fact was established, and that he had been improperly rejected. *Bunter v. Ware*, 1 B. and C. 689.³

TRESPASS FOR CRIM. CON.

In an action of trespass for criminal conversation, the plaintiff must prove, 1. His marriage, and 2. The fact of adultery. It is usual also to give evidence of circumstances in aggravation.

Evidence of marriage.] In this action the plaintiff is held to strict proof of his marriage, and proof of cohabitation and reputation is insufficient. *Morris v. Miller*, 4 Burr. 2057. *Birt v. Bartolo*, Dougl. 170. B. N. P. 27. Even the admission of the defendant has been held to be insufficient, as where being surprised at a lodging with the wife of the plaintiff, Major Morris, and being asked where Major Morris's wife was, he replied, "In the next room," for it was only a confession that she went by the name of Major Morris's wife. *Morris v. Miller*, B. N. P. 28, 4 Burr. 2057. This decision, however, does not warrant the conclusion that a distinct and full acknowledgment of the marriage made by the defendant himself will not be evidence as against him, and sufficient to dispense with the more formal and strict proof of marriage,

¹ 8 Eng. Com. Law Reps. 299. ² 8 Id. 259. ³ 8 Id. 186.

2 *Phill. Ev.* 201; and see *Freeman's case*, 1 *East*, P. C. 470. In *Rigg v. Curgenven*, 2 *Wils.* 399, where the case of *Morris v. Miller* was cited, it was said by the court, that if it were proved that the defendant had seriously or solemnly recognised that he knew the woman to be the plaintiff's wife, it would be evidence proper to be left to the jury without proving the marriage. The marriage is usually proved by the production of an examined copy of the register; and it is not necessary in such case to call the attesting witnesses, but some proof of the identity of the parties must be adduced, *ante*, pp. 62, 110; and see *Hemmings v. Smith*, 4 *Dougl.* 29. So it may be proved by calling a person who was present at the marriage, without proving the registration or license, or banns, *ante*, p. 62, though evidence of non-publication of banns may be given by the defendant, *vide post*.

If the marriage has taken place under stat. 26 Geo. II. c. 33, s. 1, in a public chapel in which banns have been usually published, the plaintiff must prove that it was a chapel in which banns had been usually published at the time of the passing of the marriage-act, 26 Geo. II. See *R. v. Northfield*, *Doug.* 658. And where a register of marriages going back to the year 1578, and a register of the publication of banns from the year 1754 (when the marriage act passed), were produced from the chapel royal in the Tower, Lord Ellesborough held that there was sufficient evidence upon which to found a presumption that banns had usually been published, before the marriage act, in that chapel. *Taunton v. Wyborn*, 2 *Campb.* 297. Marriages in chapels erected and consecrated since the 26 Geo. III. have been rendered valid by various retrospective statutes. See 21 Geo. III. c. 53, 44 Geo. III. c. 77, 48 Geo. III. c. 127, and 6 Geo. IV. c. 92. And by these statutes the registers, or copies of the registers of such marriages, are to be received in evidence. By 6 Geo. IV. c. 92, s. 2, it shall be lawful for marriages to be in future solemnized in all churches and chapels erected since the passing of 26 Geo. II. and consecrated, in which churches and chapels it has been customary and usual, before the passing of that act (6 Geo. IV.) to solemnize marriages, and the registers of such marriages, or copies thereof, are declared to be evidence. By stat. 4 G. IV. c. 76, s. 2, (after 1 Nov. 1823,) "All banns of matrimony shall be published in an audible manner in the parish church, or in some public chapel, in which chapel banns of matrimony may now or may hereafter be lawfully published, of or belonging to such parish or chapelry wherein the persons to be married shall dwell; and by sec. 3, the bishop of the diocese, with the consent of the patron and the incumbent of the church of the parish in which any public chapel, having a chapelry thereunto annexed, may be situated, or of any chapel situated in an extra-parochial

place, signified to him under their hands and seals respectively, may authorise, by writing under his hand and seal, the publication of banns, and the solemnization of marriages in such chapels, for persons residing in such chapelry or extra-parochial place; and such consent, together with such written authority, shall be registered in the registry of the diocese."

The marriage acts of 26 Geo. III. c. 33, and 4 Geo. IV. c. 76, do not extend to the marriages of *Jews and Quakers*, such marriages being expressly excepted, and they may therefore be proved in the same manner as marriages were proved before the passing of those acts. In order to prove a Jewish marriage two witnesses were called, who swore that they were present at the marriage in the synagogue; but upon an objection made, that what took place at the synagogue was merely a ratification of a previous written contract, and that as that contract was essential to the validity of the marriage, it ought to be produced and proved, the contract was put in. *Horn v. Noel*, 1 *Campb.* 61. As to the form of this contract, see *Lindo v. Belisario*, 1 *Hagg. Consist. Rep.* 225. 247. *app. p. 9*, see also *Goldsmid v. Bromer*, 1 *Hagg. Consist. Rep.* 324. If the plaintiff is a Quaker, the marriage must be proved to have taken place according to the ceremonies of that sect. 1 *Hagg. Consist. Rep. appendix*, p. 9 (n). *Deane v. Thomas*, 1 *M. and M.* 361. As to the marriages of other dissenters, there is no exception in the marriage acts; and though before those acts it seems to have been sufficient to prove a marriage according to their particular ceremonies, see *Woolston v. Scott*, *B. N. P.* 28, such proof is now insufficient. See 1 *Hagg. Consist. Rep. appendix*, 8 (n).

The marriage acts do not extend to marriages abroad, and a marriage celebrated abroad according to the law of the foreign state, is recognised in this country as a valid marriage. Therefore a marriage in Scotland, between English subjects, according to the Scotch law, is good in our courts. *Dalrymple v. Dalrymple*, 2 *Hagg. Consist. Rep.* 54. *Harford v. Morris*, *Id.* 430. Where two persons in the island of St. Domingo, being desirous of intermarrying, went to a chapel where the service was read in French, by a person habited as a priest, and interpreted into English by the officiating clerk, which service the parties understood to be the marriage service of the Church of England, and they received a certificate of the marriage, which had been lost, this evidence was held (no proof being given of the laws or usage respecting the marriage ritual in that island) to afford a presumption that the marriage had been duly celebrated according to the law of St. Domingo, particularly after eleven years' cohabitation as man and wife. *R. v. Brampton*, 10 *East*, 282. So a marriage in Ireland by a dissenting minister, in a private room, has been held good. *R. v. —*, *Old Bailey*, *coram Sir J. Silvester*, 1 *Russ. C. L.* 205, 2d ed., *Smith v. Maxwell*, 1 *R. and M.* 80. In proving a foreign marriage some

evidence must be given of the law of the foreign state; and it is the practice of the ecclesiastical courts to receive such evidence from professors of the law in question. *Lindo v. Belisario*, 2 Hagg. Consist. Rep. 248. *Middleton v. Janverin*, 2 Hagg. Consist. Rep. 441; but see *Harford v. Morris*, 2 Hagg. Consist. Rep. 431. In the case of *Dalrymple v. Dalrymple*, 2 Hagg. Consist. Rep. 81, the authorities upon which the court proceeded were of three classes: 1. The opinions of learned professors given in that or similar cases. 2. The opinions of eminent writers as delivered in books of great legal credit and weight; and, 3. The certified adjudication of the tribunals of Scotland. Where evidence of the law of Scotland with regard to the legality of a marriage was required, the testimony of a witness, who was a tobacconist, was rejected. *Anon. cited 10 East*, 287. See further as to proof of foreign laws, ante, p. 60.

A marriage between British subjects in a British settlement is valid, if it be such a marriage as would have been valid in this country before the passing of the marriage act, 26 Geo. II. Thus a marriage between two British subjects solemnized by a Catholic priest at Madras, and followed by cohabitation, but without the license of the governor, which it had been the uniform custom to obtain, is valid. *Lautour v. Teesdale*, 8 Taunt. 833.* So in the case of the *King v. Brampton*, supra, Lord Ellenborough was of opinion that as the parties had accompanied the King's forces to St. Domingo, they might be considered to have carried with them the law of England, and that therefore the marriage was valid, being according to the English law independent of the marriage act.

So the marriage of English subjects, in the chapel of the English ambassador abroad, appears to have been valid, see *R. v. Brampton*, 10 East, 286; and now by statute 4 Geo. IV. c. 91, reciting that it is expedient to relieve the minds of his majesty's subjects from any doubt concerning the validity of a marriage solemnized by a minister of the Church of England, in the chapel or house of any British ambassador, or minister, residing within the country to the court of which he is accredited, or in the chapel belonging to any British factory abroad, as well as from any possibility of doubt concerning the validity of marriages solemnized within the British lines, by any chaplain, or officer, or other person officiating under the orders of the commanding officer of a British army serving abroad, it is declared and enacted that all such marriages shall be deemed and held to be as valid in the law, as if the same had been solemnized within his majesty's dominions, with a due observance of all forms required by law.

A marriage between English subjects in a foreign country, not celebrated according to the laws of that country, nor in an ambassador's chapel, &c. is invalid. *Middleton v. Janverin*, 2 Hagg. Consist.

* 4 Eng. Com. Law Reps. 209.

Rep. 437. *Scrimshire v. Scrimshire*, *id.* 395. *Lacon v. Higgins*, 3 *Stark.* 183.*

Proof of the adultery.] "It is not necessary to prove the direct fact of adultery. In every case almost the fact is inferred from circumstances that lead to it by fair inference as a necessary conclusion. What are the circumstances that lead to such a conclusion cannot be laid down universally, because they may be infinitely diversified by the situation and character of the parties, by the state of general manners, and by many other incidental circumstances apparently slight and delicate in themselves, but which may have most important bearings in the particular case.—The only general rule that can be laid down upon the subject is, that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion." *Per Sir W. Scott, Loveden v. Loveden*, 2 *Hagg. Consist. Rep.* 2. Where the plaintiff's wife and the defendant travelled together, and the former took a house in Wales, where the defendant used to pass the day and take his meals, but slept at an inn, the Ecclesiastical Court held this cohabitation sufficient evidence of adultery, though there was no proof of other familiarities. *Cadogan v. Cadogan*, 2 *Hagg.* 4 (n); and see *Chambers v. Chambers*, 1 *Hagg. Consist. Rep.* 444. *Williams v. Williams*, *Id.* 299. *Elwes v. Elwes*, *Id.* 277. Where the statute of limitations is pleaded, the plaintiff may give evidence of acts of adultery which have taken place more than six years since, with a view to show the nature of the connexion subsisting between the parties within the six years. *Duke of Norfolk's case*, 12 *How. St. Tr.* 927. The confession of the wife is not evidence for her husband, but conversations between her and the defendant are evidence against the latter. *B. N. P.* 28, *ante*, p. 91.

Evidence in aggravation.] Conversations between the husband and wife are evidence to show their demeanour and conduct. *Trelawney v. Colman*, 1 *B. and A.* 91. So letters from the wife to the husband written before suspicion of criminal intercourse. *Ante*, p. 91. The judgment formed by a witness from the anxiety which the wife had expressed concerning her husband, and from her mode of speaking of him during his absence, is admissible evidence. *Trelawney v. Coleman*, 2 *Stark.* 192.* The wife's declarations as to her intentions in leaving her husband may be given in evidence, as part of the *res gestæ*, to remove a suspicion of connivance on his part. *Hoare v. Allen*, 3 *Esp.* 276, *ante*, p. 31. Proof of a settlement and provision for children is admissible as evidence in aggravation. *B. N. P.* 27. As to evidence of the wife's character, see *ante*, p. 37.

* 14 *Eng. Com. Law Reps.* 176. * 3 *Id.* 308.

Defence.

Evidence to disprove the marriage.] If the marriage of the plaintiff be irregular and void, the defendant may give evidence to prove that fact. Thus he may show that there was no due publication of banns; for by 4 Geo. IV. c. 76, s. 22, if any persons shall knowingly and wilfully intermarry without due publication of banns, or license, such marriage shall be null and void. Under this clause it seems to be sufficient that the banns are published in the known and acknowledged, though not the real names of the parties. Thus where a man whose name was A. L. had resided for three years in the parish in which he was married, under the name of G. S., and was married by banns by such name, the marriage was held valid. *R. v. Billingham*, 3 M. and S. 250. So where the name had been assumed for sixteen weeks, on account of the party having deserted from the army. *R. v. Burton-upon-Trent*, *Id.* 537. So where a married woman upon the death of her husband assumed her maiden name, and after the lapse of several years was married by banns to a second husband in that name, with the description of widow, it was held, in the absence of fraud, that such marriage was legal. *R. v. St. Faith's, Newton*, 3 D. and R. 348.* But where the banns have been published in the wrong names of the parties, and there is no evidence to show that they have ever been known by such names, the marriage is void. *Mather v. Ney in the Consistory Court*, 3 M. and S. 265; see also *Stanhope v. Baldwin*, 1 Addams, 93,† *Green v. Dalton*, *Id.* 289.‡ So where a wrong name is fraudulently assumed for the purposes of the marriage. *Frankland v. Nicholson, in the Consistory Court*, 3 M. and S. 259; see also *Fellowes v. Stewart*, 2 Phillim. 257,§ *Meddowcroft v. Gregory*, *Id.* 365,¶ *Bayard v. Morphew*, *Id.* 321,⋄ *Pougett v. Tomkyns*, 3 M. and S. 264.

By 4 Geo. IV. c. 76, s. 26, it shall not be necessary, in support of a marriage, to give any evidence of the residence of the parties, as directed in that act, nor shall any evidence be received to prove the contrary.

Evidence that the parties lived separate.] Whether proof that at the time of the adultery the husband and wife were living separate by consent furnishes a defence in this action, does not appear to be clearly settled. In *Weedon v. Timbrell*, 1 Esp. 16, 5 T. R. 357, S. C., where it appeared that the husband, having some suspicion of his wife's misconduct, had taken a lodging for her, for which and for her board he paid, and that at the same time when the adultery was committed, they were living in a state of separation, Lord Kenyon ruled that the action could not be maintained, and the court refused to set aside the nonsuit. So in *Bartelot v.*

* 16 Eng. Com. Law Reps. 171.

† 2 Eng. Eccles. Reps. 42. ‡ 2 Id. 121. § 1 Id. 250. ¶ 1 Id. 279. ⋄ 1 Id. 273.

Haucker, Peake, 7, where the husband and wife had been separated by articles, Lord Kenyon said, that if the parties were separated by mutual consent at the time, he was of opinion that the husband could not maintain this action, for it was impossible to receive any injury by losing the society of a wife whom he had already abandoned; but on proof of an act of adultery *before* the separation, the jury found a verdict for the plaintiff. But in a subsequent case, where the defence was that the parties were living under articles of separation at the time, Lord Kenyon said that it was a question that he had entertained considerable doubts upon, but that he was inclined to suffer the cause to proceed, and take a note of the objection, that it might be brought before the court. *Hodges v. Windham, Peake*, 39. And in a still more recent case, where the husband and wife had separated under articles, and the wife was living apart from her husband, though not in pursuance of the terms of the articles, Lord Ellenborough observed that he did not consider the question, whether the mere fact of separation between husband and wife by deed was such an absolute renunciation of his marital rights, as prevented the husband from maintaining an action for the seduction of his wife, as concluded by the decision in *Wheeldon v. Timbrell, Chambers v. Caulfield*, 6 *East*, 248. In the latter case it was held, that as the wife was not living apart from her husband with the consent of the trustees in the deed, she was not living apart from him with his consent, and that therefore the plaintiff's right to recover was not affected by the deed. Where the separation is not with a view of renouncing the marital character, as where the husband and wife are living as servants in different families, the action may be maintained. *Edwards v. Crock*, 4 *Esp.* 39.

Evidence of the plaintiff's misconduct in bar.] If a woman be suffered to live as a prostitute with the privity of her husband, and a man is thereby drawn into adultery with her, Lord Mansfield laid it down as clear law, that the action will not lie. *Smith v. Allison*, B. N. P. 27. *Hodges v. Windham, Peake*, 39. But unless with the husband's privity it will not go to the action, let her be ever so profligate, but only to the damages. B. N. P. 27. If the plaintiff was consenting to the adultery of his wife, he cannot recover. *Howard v. Burtonwood*, 1 *Selv. N. P.* 10. *Duberley v. Gunning*, 4 T. R. 656. *Hoare v. Allen, Selw. N. P.* 11 (n), 3 *Esp.* 276. Where, after marriage, the husband has openly violated those rules of conduct which decency requires and affection exacts from him; if he has openly practised his gallantries without regard to his wife, and violated the marriage bed, so as to create disgust or unhappiness in his wife, he cannot maintain this action. *Per Lord Kenyon, Sturt v. Marquis of Blandford*, cited 4 *Esp.* 17. *Wyndham v. Ld. Wycombe*, 4 *Esp.* 16. But in a subsequent case,

Ld. Alvanley said, that though he was aware that Ld. Kenyon had laid down a different doctrine, he was of opinion that the infidelity or misconduct of the husband could never be set up as a legal defence to the adultery of the wife, but that it went in mitigation of damages only. *Bromley v. Wallace*, 4 Esp. 237.

Evidence in mitigation of damages.] Proof of the husband's bad conduct, as that he lived in a criminal connexion with other women, is properly evidence in mitigation of damages. *B. N. P. 27, Bromley v. Wallace*, 4 Esp. 237. So that he had turned his wife out of the house, and refused to maintain her. *B. N. P. 27.* So for the same purpose the defendant may give evidence of the wanton manners of the wife, and that the first advances were made by her to him. *Gardener v. Jadis*, 1 Selw. N. P. 25. So that the wife has committed adultery with others, or had a bastard before marriage. *Roberts v. Malston*, B. N. P. 296. Though evidence of loose conduct or criminality with others, before the commission of the fact complained of, is admissible in mitigation of damages, yet acts of subsequent misconduct are not. *Per Lord Kenyon, Elsam v. Faucett*, 2 Esp. 562. Although in general the letters of the wife to the defendant are not evidence for him, *Baker v. Morley*, B. N. P. 28, yet where they had been written before the time, when the criminal facts were proved to have been committed, Lord Kenyon admitted them, the object being to show that the defendant had been solicited by the wife. *Elsam v. Faucett*, 2 Esp. 562.

TRESPASS FOR SEDUCTION.

In an action for seduction, the plaintiff must prove, 1. That the party seduced was, in contemplation of law, his servant; and, 2, the seduction.

Evidence of the service.] Although this action cannot be maintained without some proof of the daughter's service, or liability to service; and it is not sufficient merely to show that the plaintiff has incurred an expense in consequence of her confinement, *Satterthwaite v. Duerst*, 5 East, 47 (n), 4 Dougl. S. C., *Postlethwaite v. Parkes*, 3 Burr. 1878, *Bennett v. Alcott*, 2 T. R. 168, see 4 B. and C. 662;* yet it is not necessary to prove an actual contract of service, or that wages have been paid, but the slightest evidence of service, such as milking cows, has been held sufficient *Bennet v. Alcott*, 2 T. R. 168. Even making tea has been said to be an act of service. *Per Abbott, C. J., Carr v. Clarke*, 2 Chitty, 261,† see also *Manvell v. Thompson*, 2 C. and P. 303,‡ *Mann v. Barrett*, 6 Esp. 32. Though, to a degree, the relation of master and servant

* 10 Eng. Com. Law Reps. 438. † 18 Id. 328. ‡ 12 Id. 136.

must subsist, yet a very slight relation is sufficient, as it has been determined, that when the daughters of the highest and most opulent families have been seduced, the parent may maintain an action on the supposed relation of master and servant, though every one must know that such a child cannot be treated as a menial servant. *Per Lord Kenyon, Fores v. Wilson, Peake*, 55. So it has been ruled by *Littledale, J.*, that the proof of any acts of service is unnecessary, and that it is sufficient that she is living with her father, forming part of his family, and liable to his control and command. *Maunder v. Vann*, 1 *M. and M.* 324, see *R. v. Chillesford*, 4 *B. and C.* 102.* The action is maintainable, though the daughter was of age. *Booth v. Charlton*, cited 5 *East*, 45, *Satterthwaite v. Duerst*, *Ibid.* (n), *Tullidge v. Wade*, 3 *Wils.* 18. And where the daughter was a married woman separated from her husband, and living as a servant with her father, it was held that the latter might maintain this action. *Harper v. Luffkin*, 7 *B. and C.* 387.*

It must appear that the daughter was residing with her father at the time of the seduction. Thus where she was residing in another person's family in the capacity of housekeeper, though not under any contract for wages, and though she might have left when she pleased, it was held that the father could not maintain the action, for the daughter had no *animus revertendi*. *Dean v. Peel*, 5 *East*, 45, *Car v. Clarke*, 2 *Chitty*, 260.* But if she was merely absent on a visit at the time when she was seduced, the action lies. *Johnson v. M'Adam*, cited 5 *East*, 47. Where the defendant procured the daughter and servant of the plaintiff to leave her father, under the false pretence of hiring her as his servant, and seduced her, *Abbott, C. J.* held the action maintainable. *Speight v. Oliveira*, 2 *Stark.* 493.*

Where the action was brought by the aunt of the party seduced, with whom the latter resided, *Perryn, B.* held that she stood *in loco parentis*, and was entitled to recover, though the mother was living. *Edmonson v. Machill*, 2 *T. R.* 4, 11 *East*, 24. So where the plaintiff, an officer in the army, had adopted the daughter of a deceased soldier, he was held entitled to maintain this action. *Irwin v. Dearman*, 11 *East*, 23. So a master, who is not related to the party seduced, may recover damages against the defendant for debauching her. *Fores v. Wilson, Peake*, 55. See *Hall v. Hollander*, 4 *B. and C.* 663.*

Evidence in aggravation.] In aggravation of damages the plaintiff may give evidence of the general good conduct of his family, what other children he has, &c. *Bedford v. M'Kowl*, 3 *Esp.* 119. So the plaintiff may prove that the defendant was addressing his daughter as an honourable suitor; *Dodd v. Norris*, 3 *Campb.* 519, *Elliott v. Nicklin*, 5 *Price*, 641; but neither in chief nor on cross-examina-

* 10 Eng. Com. Law Reps. 279. * 14 Id. 58. * 18 Id. 328. * 3 Id. 445.

* 10 Id. 436.

tion can the plaintiff show, that the defendant had previously made a promise of marriage to the daughter. *Ibid.* *Tullidge v. Wade*, 3 Wils. 19.

Damages.] Though the loss of service is the legal foundation of this action, and however difficult it may be to reconcile to principle the giving of greater damages on another ground, the practice is become inveterate, and cannot now be shaken. *Per* *Ld. Ellenborough*, *Irwin v. Dearman*, 11 East, 24. Damages therefore may be given for the loss which the plaintiff has sustained by being deprived of the society and comfort of his child, and by the dishonour which he receives. *Per* *Ld. Ellenborough*, *Southernwood v. Ramsden*, *Schw. N. P.* 1042. The jury may take into their consideration all that the plaintiff can feel from the nature of the loss. They may look upon him as a parent losing the comfort as well as the service of his daughter, in whose virtue he can feel no consolation, and as the parent of other children whose morals may be corrupted by her example. *Per* *Ld. Eldon*, *Bedford v. McKoul*, 3 Esp. 120, *see also* *Chambers v. Irwin*, 2 *Schw. N. P.* 1042, *Tullidge v. Wade*, 3 Wils. 19.

The plaintiff must be prepared to prove the amount of the expenses sustained by him in consequence of his daughter's confinement, &c. *Tullidge v. Wade*, 3 Wils. 19. The amount of a surgeon's bill, though not paid, may be recovered, but a physician's fees cannot be taken into the account, if not actually paid, since the payment of them cannot be enforced by action. *Dixon v. Bell*, 1 Stark. 289.[†]

Evidence of character.] The plaintiff cannot give evidence of the daughter's good character, unless in answer to evidence of general bad character on the other side; *Bamfield v. Massey*, 1 Campb. 460, *ante*, p. 37; and even where the daughter had been cross-examined as to circumstances of extreme indelicacy and levity in her conduct, Lord Ellenborough ruled that the plaintiff was not at liberty to call witnesses to character, for that there was an opportunity of explaining, on re-examination, the questions put on the cross-examination. *Ibid.* But where the cross-examination of the party seduced went to show that she had conducted herself immodestly towards the defendant before the seduction, and that she kept improper company, the plaintiff was allowed, without objection, to prove the general good character and modest deportment of his daughter, and the general respectability of the family. *Bate v. Hill*, 1 C. and P. 100.[‡] If the daughter be asked, whether before her acquaintance with the defendant she had not been criminally connected with other men, she is not bound to answer the question. *Dodd v. Norris*, 3 Campb. 519.

[†] 2 Eng. Com. Law Reps. 392. [‡] 11 Id. 329.

Defence.

Where the plaintiff had been guilty of gross misconduct in suffering the defendant to continue his visits as a suitor to his daughter, after he knew that he was a married man, and had received a caution against admitting him into his family, Lord Kenyon held that the action could not be maintained. *Reddie v. Scoolt, Peake*, 240.

In mitigation of damages, the defendant may show the loose character of the daughter. *Dodd v. Norris*, 3 *Campb.* 519. So it seems that, upon principle, he may show that the father was a man of profligate habits.

TRESPASS FOR ASSAULT AND BATTERY.

In an action of trespass for assault and battery, the evidence for the plaintiff varies according to the nature of the defendant's plea.

Evidence under the general issue.] Under the general issue, the plaintiff must prove an assault or battery. An attempt to do a corporal injury to another, coupled with a present ability, as holding up a weapon at a man within reach, is evidence of an assault. *Genner v. Sparks*, 1 *Salk.* 79. So riding after a person and obliging him to run into a garden to avoid being beaten, is an assault. *Marlin v. Shoppie*, 3 *C. and P.* 373.^a A battery, which always includes an assault, is the actual doing an injury, be it ever so small, in an angry or revengeful, or rude or insolent manner, as by spitting in a man's face, or violently jostling him out of the way. *B. N. P.* 15. In order to constitute a battery, it is not essential that the act should appear to be wilful; if it happens by negligence or mistake an action will lie, for no man shall be excused of a trespass, except it may be judged utterly without his fault. *Per Cur. Weaver v. Ward*, *Hob.* 134. Therefore where a soldier in exercise wounded one of his comrades by accident, he was held liable in trespass. *Ibid. Underwood v. Hewson*, 1 *Str.* 596. But where the conduct of the defendant is entirely without fault, no action will lie. *Wakeman v. Robinson*, 1 *Bingh.* 213,^b *B. N. P.* 15. Thus where the defendant and another person were fighting, and the plaintiff came and took hold of the defendant by the collar, in order to separate the combatants, whereupon the defendant beat the plaintiff, on *son assault demesne* pleaded, and replication *de injuriâ suâ propriâ*, it was objected that the plaintiff ought to have replied the matter specially, but Legge, B. overruled the objection, observing that the evidence was not offered by way of justification, but

^a 14 Eng. Com. Law Reps. 355. ^b 8 Id. 300.

for the purpose of showing that there was not any assault, for it was the *quo animo* which constituted an assault which was matter to be left to a jury. *Griffin v. Parsons*, 1 *Schw. N. P.* 27 (n), see also *Gibbons v. Pepper*, 2 *Salk.* 637.

Where it is stated in the declaration that the defendant on divers days and times, between two certain days, assaulted the plaintiff, the plaintiff may give in evidence any number of assaults within those days, or he may prove a single trespass at any time before action brought, *B. N. P.* 86, 1 *Saund.* 24 (n); and even after proving several assaults within the days mentioned in the declaration, he would perhaps be allowed to give evidence of assaults committed before that time, as proof of the defendant's malice. 2 *Phill. Ev.* 194.

Where the declaration contains only one count, the plaintiff cannot, after giving evidence of one assault, waive that assault and give evidence of another. *Stante v. Preckett*, 1 *Campb.* 473. When the action is brought against several for a joint trespass committed at a particular time, he must confine himself to that period: and if all the defendants were not then concerned in the trespass committed at that time, the plaintiff cannot have recourse to a trespass committed at any other time, when some only of the defendants were concerned, who were not implicated in the first transaction, for some of the defendants might thereby be subjected to damages for a trespass in which they had no concern. *Sedley v. Sutherland*, 3 *Esp.* 202.

In general, matters in excuse or justification cannot be given in evidence under the general issue. But by various statutes such evidence is admissible. See stat. 43 Eliz. c. 2, s. 19, 7 Jac. I. c. 5, 21 Jac. I. c. 12, s. 5, 11 G. II. c. 19, s. 21, 23 G. III. c. 70, s. 34, 24 G. III. sess. 2, c. 47, s. 35, 39, 28 G. III. c. 37, s. 23, 42 G. III. c. 85, s. 6, 43 G. III. c. 99, s. 70. *Tidd*, 704 (n).

[*Evidence under son assault demesne.*] One of the most usual pleas in this action is *son assault demesne*, that the plaintiff made the first assault, a defence which must be specially pleaded. *Co. Litt.* 282, b. If to this plea the plaintiff reply *de injurâ suâ propriâ absque tali causâ*, such replication puts the matter of the plea in issue, and the defendant will have to prove a prior assault by the plaintiff. If he prove that the plaintiff lifted up his stick, and offered to strike him, it is a sufficient assault to justify his striking the plaintiff, and he need not stay till the plaintiff has actually struck him. *B. N. P.* 18. But it is not every assault that will justify every battery, and it is matter of evidence whether the assault was proportionable to the battery; thus a man cannot justify a maim for every assault, as if A. strike B., B. cannot justify drawing his sword and cutting off A.'s hand. *Per Cur. Cooke v. Beal*, 1 *Ld. Raym.*

177. It seems, however, that in such case the plaintiff will not be allowed to take advantage of the excess in the violence of the defendant's assault, under the general replication of *de injuriâ*, but that he should reply the excess in order to entitle him to take advantage of it. *Skinner*, 387, see *Franks v. Morrice*, 10 *East*, 81 (n). Thus where the plaintiff declared that the defendant beat, bruised, and wounded him, and the defendant pleaded *son assault demesne* to which the plaintiff replied *de injuriâ* generally, and it appeared in evidence that the plaintiff meeting the defendant, shook his stick at him; whereupon the defendant committed a violent assault upon the plaintiff, and beat him, on a verdict being found for the defendant, the court held that if the defendant had assaulted the plaintiff and beat him more violently than he ought to have done, or was necessary for the defence of himself, the plaintiff ought to have replied that fact specially. *Dale v. Wood*, 7 *B. Moore*, 33.* *Bowen v. Parry*, 1 *C. and P.* 394.¹ So where the plaintiff can justify his first assault he must plead such matter of justification specially, for it cannot be given in evidence under the replication *de injuriâ*, &c. *King v. Sheppard*, *Carth.* 281, *B. N. P.* 18.

Where there is only one count in the declaration, and the defendant pleads *son assault demesne*, and proves an assault by the plaintiff on the day mentioned in the declaration, or on another day before action brought, the plaintiff will not be entitled to give evidence of an assault committed by the defendant on another day. *Downes v. Skrymsher*, 1 *Brownl.* 235. *B. N. P.* 17. *Roll. Ab. Trial* (c). If in fact there are two assaults, one only of which the defendant can justify, and he pleads *son assault demesne*, the plaintiff should new assign; but if there are two counts in the declaration, the new assignment will be unnecessary, for as the defendant can only prove one justification, the plaintiff on proving two assaults must have a verdict. *B. N. P.* 17. Yet where there are two counts, if the defendant pleads not guilty, and a justification, and in his justification alleges that the trespasses in both counts are one and the same, and the plaintiff replies *de injuriâ*, &c., he will be confined to the proof of one trespass only. *Gale v. Dalrymple, R. and M.* 118, *Gibson v. Hawkey*, *Id.* 121, (n). In some cases if there are two counts in the declaration, the plaintiff by new assigning may preclude himself from giving evidence of two acts of trespass. Thus where the declaration contained two counts for assault and false imprisonment, and the defendant pleaded not guilty to both counts, and a justification under mesne process to the first count, the plaintiff as to the justification new assigned, whereby he admitted that the arrest under the mesne process was justified, and then gave in evidence another act of imprisonment under the new assignment, upon which he failed, it was held that he could

* 17 *Eng. Com. Law Reps.* 69. ¹ 11 *Id.* 432.

not give evidence of either act of trespass under the second count, for that there was but one imprisonment besides that which he had waived, and that one being the subject of the new assignment, the plaintiff could not avail himself of it on the second count. *Atkinson v. Matteson*, 2 T. R. 172.

Evidence on plea of justification in defence of possession.] If the defendant pleads that he was possessed of a house, &c. and that the plaintiff without his license entered therein and disturbed the defendant, whereupon he requested the plaintiff to depart, which he refused to do, whereupon the defendant gently laid hands upon him to turn him out of the house; the proof of this plea lies upon the defendant, and he must show his possession of the house, the plaintiff's entry and disturbance, that he requested the plaintiff to depart, and on his refusal gently laid hands on him. If the plaintiff resist the defendant upon his gently laying hands on him, the defendant may repel force with force, and any degree of violence may be justified. *Green v. Goddard*, 2 Salk. 641, which may, it seems, be properly given in evidence under the above plea, if the plaintiff has replied *de injuriâ* only. If the plaintiff enter forcibly into the defendant's house, the latter may resist force by force, without any previous request to depart, but the justification in such case should not be pleaded by way of *molliter manus imposuit*, upon which it would be necessary to shew a previous request to depart; the defendant should plead that the plaintiff with strong hand endeavoured forcibly to break and enter the defendant's close, whereupon the defendant resisted and opposed such entrance, &c. and that if any damage happened to the plaintiff it was in the defence of the possession of the close. If in fact the defendant was guilty of an excess of violence in resisting the plaintiff, the latter should new assign such excess. *Weaver v. Bush*, 8 T. R. 78.

So in action for an assault and battery and false imprisonment, the battery may be justified under a *molliter manus imposuit*, and if there was an excessive or subsequent battery, the plaintiff should new assign. *B. N. P.* 19. *Willes*, 17 (n). 1 *Saund.* 296 (n).

Evidence under alia enormia.] Nothing can be given in evidence under *alia enormia* except acts which could not be put upon the record. *Per Lord Kenyon*, *Lowden v. Goodrick*, *Peake*, 46. Therefore in an action for trespass and false imprisonment, it was ruled that the plaintiff could not show that he had been stinted in his food. *Ibid.* Or that he caught the jail fever. *Pettit v. Addington*, *Id.* 62.

Damages.] Evidence may be given of the circumstances which accompany and give a character to the trespass, in order to en-

hance the damages. *Bracegirdle v. Orford*, 2 M. and S. 79. The circumstances of time and place, when and where the insult was given, require different damages; as it is a greater insult to be beaten upon the Royal Exchange than in a private room. *Per Bathurst, J., Tullidge v. Wade*, 3 Wils. 19.

Defence.

Although the defendant cannot, under the general issue, give in evidence matter of defence amounting to a justification, yet he may, as it seems, give any circumstance in evidence, in mitigation, which tends to reduce the quantum of damages, and which could not have been pleaded. 3 Stark. Ev. 1460. Vin. Ab. Ev. (1 b). pl. 16. 2 B. and P. 225 (n). So in trespass for false imprisonment against a private individual, evidence of reasonable suspicion of the plaintiff's having been guilty of the felony, is admissible on the general issue in reduction of damages. *Chinn v. Morris, R. and M.* 424. So in trespass for false imprisonment against the captain of a ship, Buller, J. admitted evidence of expressions used by the plaintiff at the time, tending to create mutiny and disobedience, for every thing which passed at the time was part of the transaction on which the plaintiff's action was founded, and he therefore could not be surprised by the evidence. *Bingham v. Garnault*, 1 Esp. Dig. 337. But in trespass for assault and battery, on not guilty pleaded, evidence was offered that the beating in question was given by way of punishment for misbehaviour on board the ship of which defendant was captain, and it was insisted that the conduct of the defendant at the time of the assault being necessarily in evidence proved that misbehaviour, Lord Eldon, C. J. was of opinion that there was no justification pleaded, the jury should give damages to the amount of the injury suffered without lessening them on account of the circumstances under which it was inflicted, and the court of Common Pleas were of opinion that this direction was right. *Watson v. Christie*, 2 B. and P. 224.

TRESPASS FOR FALSE IMPRISONMENT.

In an action of trespass for false imprisonment, the plaintiff must prove the fact of the imprisonment and the amount of damages.

Form of action with regard to justices, &c.] In actions against justices and others having authority to imprison, it frequently becomes a question, whether the proper form of action is trespass or case. "The general rule of law as to actions of trespass against persons having a limited authority (as Commissioners of bank-

rupt) is plain and clear. If they do any act *beyond* the limit of their authority, they thereby subject themselves to an action of trespass; but if the act done be *within* the limit of their authority, although it may be done through an erroneous or mistaken judgment, they are not thereby liable to such action." *Per Abbott, C. J., Doswell v. Impey*, 1 B. and C. 169,^a and see *Lowther v. Earl of Radnor*, 8 East, 113. *Pike v. Carter*, 3 Bingh. 78,^a 10 B. Moore, 376, S. C. Where a magistrate exercises the legal authority vested in him, in a harsh, undue, or oppressive manner, case and not trespass is the remedy. See *Wilkes v. Bridger*, 2 B. and A. 286. But where a magistrate acts without those circumstances, which must concur to give him jurisdiction, as where he maliciously grants a warrant, without information, upon a supposed charge of felony, he is liable in trespass. *Morgan v. Hughes*, 2 T. R. 225. Where a magistrate commits a person for re-examination for an unreasonable time, it seems that the commitment is wholly void, at all events he is answerable in trespass, the continuance of the party in custody after a reasonable time being a new trespass. *Davis v. Capper*, 10 B. and C. 28.

An action of trespass cannot be maintained against a judicial officer, as against the steward of a court Baron, where his bailiff by mistake takes the goods of A. under a precept against B. *Holroyd v. Breare*, 2 B. and A. 473. Nor will trespass lie against the sheriff for the act of his bailiff under a judgment obtained in the county court. *Tinsley v. Nassau*, 1 M. and M. 52.

Form of action with regard to private individuals.] If a party acts himself in apprehending another, he may be liable in trespass, but if he falsely and maliciously, and without any probable cause, puts the law in motion, that is properly the subject of an action on the case. *Per Bayley, J., Elsee v. Smith*, 1 D. and R. 103.^a If the warrant be illegal under which the party acted, he is liable in trespass, and in such an action if the plaintiff's counsel open the case as an arrest upon an illegal warrant, the plaintiff is not bound to produce the warrant, but the defendant, if he relies upon it as a justification, must produce it. *Holroyd v. Doncaster*, 3 Bingh. 492.^a Where the defendant represented that the plaintiff was a fit person to be impressed, and in consequence he was impressed, though not a fit person, it was held that the defendant was liable in trespass. *Per Lord Ellenborough*, "This is not like a malicious prosecution, where the party gets a valid warrant or writ, and gives it to an officer to be executed. There was clearly a trespass here in seizing the plaintiff, and the defendant therefore was a trespasser in procuring it to be done; nor is proof of malice necessary." *Flewster v. Royle*, 1 Campb. 187.

^a 8 Eng. Com. Law Reps. 51. ^a 11 Id. 37. ^a 16 Id. 22. ^a 13 Id. 61.

Proof of the Imprisonment.] The circumstances which will amount in law to an arrest or imprisonment are stated in another place. *Vide ante*, p. 304, and *post*; "*Actions against Constables.*"

Defence.

In actions against justices, constables, churchwardens, &c., the defendants may give any special justification in evidence under the general issue, 21 *Jac.* 1 c. 12 s. 2 *infra*. A private individual is not within the above statute, unless he is acting in aid of the constable. See *Bond v. Rust*, 2 C. and P. 342.¹ And unless he be within the statute, he must plead his justification specially, and must prove it as stated. Mere suspicion will not justify a private person in apprehending another on a charge of felony, though it is evidence in mitigation of damages under the general issue. *Adams v. Moore*, 2 *Setw. N. P.* 685, 4th Ed. *Chinn v. Morris*, R. and M. 424, 2 C. and P. 361,² S. C. *Cowles v. Dunbar*, 2 C. and P. 568,³ and see *Bingham v. Gurnault*, 1 *Esp. Dig.* 337.

A constable who has reasonable ground for suspecting that a felony has been committed, or is about to be committed, is justified in arresting the party whom he suspects, but in order to justify a private individual in making the arrest, he must not only show a reasonable ground of suspicion, but he must prove that a felony has actually been committed. *Beckwith v. Philby*, 6 B. and C. 635.⁴ *Hedges v. Chapman*, 2 *Bingh.* 523.⁵ *Stonehouse v. Elliott*, 2 T. R. 315, *Ex parte Krans*, 1 B. and C. 261.⁶

A private person may imprison another to prevent the committing of a felony. *Handcock v. Baker*, 2 B. and P. 260.

Where the plaintiff was in fact protected from arrest as a privileged person, it is a good defence to show that he did not insist on his privilege. See *Pike v. Carter*, 3 *Bingh.* 84.⁷

Witnesses.

Where in an action against three persons for false imprisonment, the plaintiff had connected all the defendants as joint trespassers, it was ruled that declarations made by one of the defendants after the imprisonment, and in the absence of the others, were admissible. *Wright v. Court*, 2 C. and P. 232.⁸ Where one person puts a party into the custody of another, what is said and done by that other is evidence against the person placing the party in custody, though said or done in his absence. *Per Garrow, B. Powell v. Hodgetts*, 2 C. and P. 433.⁹ But the declarations of one tortfeasor are not evidence for the others. *Daniels v. Potter*, 1 M. and M. MSS.

¹ 12 Eng. Com. Law Reps. 160. ² 12 Id. 171. ³ 12 Id. 264. ⁴ 13 Id. 287.

⁵ 9 Id. 508. ⁶ 8 Id. 70. ⁷ 11 Id. 37. ⁸ 12 Id. 104. ⁹ 12 Id. 206.

TRESPASS TO PERSONAL PROPERTY.

THE evidence for the plaintiff, in an action of trespass for taking away or injuring personal property, varies according to the nature of the issue joined between the parties.

Form of action, trespass or case.] In cases of accidents arising in driving carriages, steering ships, &c., questions have frequently arisen as to the proper form of action. The following distinctions may be drawn from the decisions on this subject. See 2 H. B. 442, (n) 4th Ed.

1. Where the injury is both *wilful* and *immediate*, as where a person wilfully rows a boat against nets and destroys them, *Tripe v. Potter*, cor. *Yates J.* cited 8 T. R. 191, trespass is the only form of remedy. See *Ogle v. Barnes*, 8 T. R. 192. *Moreton v. Hardern*, 4 B. and C. 227.*

2. Where the injury is *immediate* but not *wilful*, occurring only by the *negligence* of the party, as where a man firing a gun without sufficient caution accidentally hurts another. *Weaver v. Ward*, Hob. 134. *Underwood v. Hewson*, 1 Str. 596, or where a person drives on the wrong side of the way in the dark and accidentally injures another carriage, *Leame v. Bray*, 3 East, 593, *Lotan v. Cross*, 2 Campb. 465, *Hopper v. Reeve*, 1 B. Moore, 407,* or where a person steering a ship through ignorance or unskilfulness runs it against another, *Covill v. Laming*, 1 Campb. 497, trespass may be maintained. But trespass is not the only form of remedy, for the party injured may as it seems waive the trespass and sue in case for the negligence. Thus where the plaintiff declared that the defendants so incautiously, carelessly, negligently, and inexpertly managed and steered their ship, that by reason of their negligence &c., the ship sailed and ran foul of the ship of the plaintiff; after verdict for the plaintiff and motion in arrest of judgment, the Court of King's Bench refused to arrest the judgment. *Ogle v. Barnes*, 8 T. R. 188. *Turner v. Hawkins*, 1 B. and P. 472. So where the declaration stated that the defendant took such bad care of his cart and horse in driving, that through his negligence, inattention, and want of care, &c. the cart struck the horse of the plaintiff with such force and violence, that the horse was much hurt, &c.; on demurrer the court intimated a clear opinion, that as the injury was expressly alleged in the declaration to have arisen from mere negligence, inattention, and want of care, the demurrer could not be sustained. *Rogers v. Imbleton*, 2 Bos. and Pul. N. R. 117. *Recog. Moreton v. Hardern*, 4 B. and C. 227.*

In *Hall v. Pickard*, 3 Campb. 187, it is stated by Lord Ellenborough that "it may be worthy of consideration, whether in those

instances where trespass may be maintained the party may not waive the trespass, and proceed for the tort." In an action on the case against several persons as owners of a coach, for carelessly and negligently driving their coach, by their servant, &c., it appeared that at the time of the accident one of the defendants was himself driving, and it was insisted that the action ought therefore to have been in trespass, and not in case, but the Court of King's Bench held the action to be rightly brought, for that the plaintiff had a right to sue all the defendants, and that trespass could not have been maintained against them all. Bayley, J. said in reference to *Leame v. Bray*, that the court there did not decide that an action on the case would have been improper; "No doubt," his lordship said, "trespass lies when an injury is inflicted by the wilful act of the defendant, but it is also clear that case will lie when the act is negligent and not wilful." Holroyd, J. said, "In cases where there is no ground of action except the trespass, perhaps case will not lie, but where an actual damage has been sustained, the trespass may be waived, and an action is maintainable on the special circumstances of the case." Littledale, J. said, "Here the defendant Hardern may at the moment have done all in his power to avoid the accident, but may have been unable to do so in consequence of antecedent negligence, and it being found that the plaintiff sustained the injury in consequence of his careless driving, that sustains the present form of action." *Moreton v. Hardern*, 4 B. and C. 223. See also *Branscomb v. Bridges*, 1 B. and C. 145.*

3. Where the injury is not immediate, but consequential, trespass will not lie, and case is the proper remedy. "In all the books the invariable principle to be collected is, that where the injury is immediate on the act done, there trespass lies, but where it is not immediate on the act done, but consequential, then the remedy is in case." *Per Le Blanc*, *J. Leame v. Bray*, 3 Fast, 602. *Covell v. Laming*, 1 Campb. 498. *Day v. Edwards*, 5 T. R. 649.

4. Where the act arises by the negligence of the defendant's servants, trespass cannot be maintained, and case is the only remedy. *Morley v. Gaisford*, 2 H. Bl. 442. *Huggett v. Montgomery*, 2 Bos. and Pul. N. R. 446. 4 B. and C. 227.*

3. Where the property injured is not in the immediate possession of the owner, but has been let to hire, the owner must bring case, and cannot maintain trespass, for it is in the nature of an injury to his reversion. *Hall v. Pickard*, 3 Campb. 187. But the mere gratuitous bailing of the property to another, does not take it out of the possession of the owner so as to prevent him from maintaining trespass. *Lotan v. Cross*, 2 Campb. 464.

Evidence under the general issue.] The plaintiff under the ge-

eral issue must prove his possession of the chattels, but he need not prove his title as against a wrong-doer, *see post* p. 305. The landlord of a furnished house cannot maintain trespass against the sheriff for taking the goods in execution. *Ward v. Mucanley*, 4 T. R. 489. But it is sufficient if the plaintiff at the time the act was done had the *constructive* possession of the chattels; thus a person who has the right of property may maintain trespass though not actually in possession, for the right of property draws to it the right of possession. Therefore where goods are taken after the owner's death, and before probate granted to his executor, the latter, after probate granted, may maintain trespass. *Com. Dig. Tres. (B. 4), Smith v. Milles*, 1 T. R. 480. So the lord of a manor may maintain trespass for an estray or wreck, before seizure. *Ibid.* So a person who has leased his land for years, without any reservation of the timber, may have trespass *de bonis asportatis*, during the continuance of the term, against a third person, who wrongfully cuts down the timber, and after it is severed carries it away. *Ward v. Andrews*, 2 Chitty, 630.⁴ So if the owner of a chattel gratuitously permit another to use it, he may maintain trespass for an injury done to it while it is so used. *Lotan v. Cross*, 2 Campb. 464. But it is otherwise where the chattel is let to him; thus where the plaintiff hired a chariot for the day, and appointed the coachman and furnished the horses, it was held that he was properly described as the proprietor and owner of the chariot. *Croft v. Alison*, 4 B. and A. 590.⁵

The plaintiff must show an act amounting to a trespass on the part of the defendant. Thus where a sheriff seizes goods after a secret act of bankruptcy by the owner, upon which a commission subsequently issues, the sheriff cannot be made a trespasser by relation, and trover, and not trespass, is the proper remedy. *Cooper v. Chitty*, 1 Burr. 20, *Smith v. Milles*, 1 T. R. 475.

Throwing down and breaking a jar has been held to be a sufficient asportation and conversion of a chattel to entitle the plaintiff to full costs. *Gosson v. Graham*, 1 Stark. 55.⁶

Defence.

[*Evidence under the general issue.*] Under the general issue the defendant may show that the goods in question were not the property of the plaintiff. Thus in an action against a sheriff for taking the plaintiff's goods, the defendant may show, under the general issue, that the plaintiff derives title to the goods under a bill of sale fraudulent as against creditors, and that the defendant took them

⁴ 18 Eng. Com. Law Reps. 435. ⁵ 6 Id. 528. ⁶ 2 Id. 293.

under a judgment and execution against the real owner. *Martin v. W. Bl.* 701, see *Lake v. Billers*, 1 *Ld. Raym.* 733. But where the sheriff justifies taking the plaintiff's own goods under a writ of execution, such justification should be specially pleaded; for the property of the goods continues in the plaintiff till execution executed, and the sheriff therefore cannot show that when he took them they were not the plaintiff's goods. *B. N. P.* 91, see post, "in Actions against Sheriffs." So the defendant cannot justify, under the general issue, the cutting the posts and rails of the plaintiff, though put upon the defendant's soil. *Welsh v. Nash*, 8 *East*, 394. But where the defendant was a pound-keeper, and merely received into his pound the cattle taken by others, it was held that he was not even *prima facie* a trespasser, and that he might give his defence in evidence under the general issue. *Badkin v. Powell, Cowper*, 476. Although in trespass for taking goods, as a distress for rent, the defendant may give his justification in evidence under the general issue, by stat. 11 G. II. c. 19, s. 21, yet where the goods have been clandestinely removed from the premises, and afterwards seized by the defendant, the defence must be specially pleaded. *Vaughan v. Davis*, 1 *Esp.* 256, *Furneaux v. Fotherby*, 4 *Campb.* 136.

In trespass for destroying a picture the defendant may show, in mitigation of damages, that it was a scandalous libel, and the plaintiff shall only recover the value of the canvass and paint. *Du Bost v. Beresford*, 2 *Campb.* 511.

TRESPASS QUARE CLAUSUM FREGIT.

UNDER the general issue in trespass *quare clausum fregit* the plaintiff must prove his possession of the *locus in quo*, and the trespass committed by the defendant. Where a justification or other special plea is pleaded, the evidence varies according to the nature of the issue joined between the parties.

Evidence of possession.] In order to maintain this action the plaintiff ought to have had possession actual or constructive. *Topham v. Dent*, 6 *Bingh.* 516.^a Any possession is a legal possession as against a wrong-doer. *Graham v. Peat*, 1 *East*, 246. *Catteris v. Cowper*, 4 *Taunt.* 547, *Dyson v. Collick*, 5 *B. and A.* 603.^b Thus a person occupying crown lands, under a parol license, has such a possession as entitles him to maintain trespass against a wrong-doer. *Harper v. Charlesworth*, 4 *B. and C.* 574.^c So if a tenant holds over after the expiration of his lease, or incurs a forfeiture by committing waste or otherwise, yet if the landlord permits him to continue in actual possession he may

^a 19 Eng. Com. Law Reps. 154. ^b 7 Id. 203. ^c 10 Id. 412.

maintain trespass against any person entering upon him, and not having a better title than himself. *Per Littledale, J., Ibid.* 594. *Com. Dig. Trespass (B. 1)*. But commissioners of sewers under stat. 23 H. VIII. c. 5, have not such a possession in their works, as will enable them to maintain trespass for breaking down a wall, or dam, erected by them across a navigable river. *Duke of Newcastle v. Clark*, 8 Taunt. 602.² Such commissioners have merely a right to enter upon the *locus in quo* for the purpose of doing certain acts. *Dyson v. Collick*, 5 B. and A. 603.¹ So the persons who by 16 and 17 Car. II. are authorised to make navigable certain rivers, have no interest in the soil of a bank formed of the earth excavated from the channel of a river, so as to entitle them to maintain trespass *quare clausum fregit* for an injury to such bank. *Hollis v. Goldfinch*, 1 B. and C. 205.³ But where certain private individuals contracted with the proprietors of a navigation to form a canal, and erected a dam of earth and wood upon a close, with the permission of the owner, for the purpose of completing their work, it was held that they had a sufficient possession to support trespass against a wrong-doer. *Dyson v. Collick*, 5 B. and A. 600.¹

Where a party has an interest in the soil, it is not in all cases necessary that he should have an exclusive possession. Thus the owner of the soil of a street, dedicated to the public, may maintain trespass for an injury to the soil; *Lade v. Sheppard*, 2 Str. 1004; and so also with regard to the owner of a market. *Mayor of Northampton v. Ward*, 1 Wils. 107.

It is not necessary that a party who enters upon land should declare that he enters to take possession, it is sufficient if he does any act to show his intention. His servants ploughing the land will be evidence of possession. *Butcher v. Butcher*, 7 B. and C. 399,⁴ 1 M. and R. 220, S. C. The occasional possession of the key of a chapel with license to preach there is not sufficient to maintain trespass. *Reverte v. Brown*, 5 Bingh. 7.⁵

Evidence of possession—property, or interest in the soil, not necessary.] Exclusive possession, without property or interest in the soil, is sufficient to maintain this action. Thus one who has the herbage, *Co. Litt.* 4 B. *Weldon v. Bridgwater*, Cro. Eliz. 421, Vin. Ab. *Trespass (H)*, or the vesture or pasture of a close, *Co. Litt.* 4 b. B. N. P. 85, *Wilson v. Mackreth*, 3 Burr. 1827, *Parker v. Staniland*, 11 East, 366, *Evans v. Roberts*, 5 B. and C. 837,⁶ may maintain trespass. So a person entitled to the exclusive enjoyment of a crop growing on land, during the proper period of its full growth, and until it be cut and carried away, may, in respect of such exclusive possession, maintain trespass. *Per Lord Ellenborough*, *Crosby v. Wadsworth*, 6 East, 609, *Tomkinson v. Russel*, 9 Price, 267. So where a person has an exclusive right of digging turves.

¹ 4 Eng. Com. Law Reps. 219. ² 7 Id. 203. ³ 8 Id. 62. ⁴ 14 Id. 89.

⁵ 15 Id. 345. ⁶ 12 Id. 377.

Wilson v. Mackreth, 3 Burr. 1624; or a grant of underwood. *Hoe v. Taylor*, Cro. Eliz. 413. So the owner of a free warren. *F. N. B.* 66. *M. Com. Dig. Trespass*, (A. 2). *Lord Dacre v. Tebb*, 2 W. Bl. 1151. *Smith v. Kemp*, 2 Salk. 637; but see *Weldon v. Bridgwater*, Cro. Eliz. 421. And where a meadow is divided annually amongst certain persons by lot, after their several portions are allotted, each has an exclusive possession, and may maintain trespass. *Weldon v. Bridgwater*, Cro. Eliz. 421, Co. Litt. 4 a. 48, b. 5 East, 481, 13 East, 159, 1 B. and C. 389.¹

Evidence of possession—immediate.] It must appear that the plaintiff was in the actual and immediate possession of the *locus in quo* when the trespass was committed. Therefore an heir before entry, who has only a seisin in law, cannot maintain trespass. *Com. Dig. Trespass* (B. 3). So a bargainee before entry. *Ibid.* *Barker v. Kent*, 2 Mod. 251, *Geary v. Bearcroft*, Cart. 66, but see *Anon.* Cro. Eliz. 46. So neither the devisee of a fine, *Berry v. Goodman*, 2 Leon. 147. Arg. a devisee, *Anon.* 2 Mod. 7, *Geary v. Bearcroft*, *Bridgm. Judgm.* 495, a surrenderer, *Br. Ab. Surr.* 50, a reversioner after the expiration of an estate for life or years, *Keiho.* 163, a. *Com. Dig. Tres.* (B. 8), nor a lessee for years, *Keiho.* 163, a. *Bac. Ab. Leases*, M. can bring trespass before entry. So a parson before induction. *Plowd.* 528. But after induction he may maintain trespass for an injury to the glebe-lands, although he has not made an actual entry upon the part on which the trespass was committed, for the act of induction puts him into possession of part for the whole. *Buhrer v. Buhrer*, 2 B. and A. 470. On the determination of a lease at will by the death of the lessee, the lessor may maintain trespass before entry. *Co. Litt.* 62, b. *Geary v. Bearcroft*, 1 Lev. 202. And there are authorities to show that where land is let to a lessee at will, and a trespass is done to the land, both the lessor and lessee may maintain trespass. *Per Holroyd, J., Harper v. Charlesworth*, 4 B. and C. 583.² See 2 *Rol. Ab.* 551, l. 49. *Com. Dig. Tres.* (B. 2.) *Bridgm. Judgm.* 496 (n). If a lessee at will commits voluntary waste, the lessor may immediately maintain trespass against him, for the committing waste amounts to a determination of the will. *Lady Shrewsbury's case*, 5 Rep. 13, b. *Co. Lit.* 57, a. Where trees are excepted in a lease, the lessor may maintain trespass *quare clausum fregit* against any one who cuts them down, for by the exception of the trees the land on which they grow is excepted also. *Br. Ab. Tresp.* 55, *Ashmead v. Rangor*, 1 *Ld. Raym.* 552. Actual possession at the time of the trespass done is sufficient; it is not necessary that the plaintiff should be in possession at the time of action brought. 2 *Rol. Ab.* 569. l. 20.

¹ 8 Eng. Com. Law Reps. 108. ² 10 Id. 412.

Evidence of possession by relation.] Although to maintain this action the plaintiff must have had the immediate possession at the time of the injury, yet there are some cases in which, by the doctrine of relation, the plaintiff is allowed to recover for trespasses committed at a period when he was not in fact in possession. Thus a disseisee who re-enters reverts the possession in himself *ab initio*, and may have trespass against the disseisor or a stranger, for any act of trespass committed between the disseisin and the re-entry, 2 *Roll. Ab.* 550, l. 7. 554. l. 39. *Co. Lit.* 257, a; but where a fine has been levied with proclamations, the re-entry of the party will not revert the possession by relation *ab initio*. *Compere v. Hicks*, 7 *T. R.* 727, *Hughes v. Thomas*, 13 *East*, 486.

Evidence of the ownership of wastes, rivers, walls, ditches, &c.] The waste land adjoining to a public highway is presumed, in the first instance, to belong to the owner of the adjoining land, as the highway itself *usque ad filum* does, and not to the lord of the manor. *Steel v. Prickett*, 2 *Stark.* 468.* And this rule is the same whether the adjoining land be freehold or copyhold. *Doe v. Pearsey*, 7 *B. and C.* 304,† *Cooke v. Green*, 11 *Price*, 736. The presumption is to be confined to that extent, and if the narrow strip be contiguous to, or communicate with, open commons or larger portions of land, the presumption is either rebutted or considerably narrowed, for the evidence of ownership which applies to the larger portions, applies also to the narrow slip which communicates with them. *Grose v. West*, 7 *Taunt.* 41.‡ *Headlam v. Hedley*, *Holt*, 463.‡ The cutting down trees in a way, or clearing it, is evidence to prove the right of soil of the way. See *Berry v. Goodman*, 2 *Leon.* 148. *Vin. Ab. Evid.* (T. b. 102.)

Fresh rivers of common right belong to the owners of the soil adjacent, so that the owners of the one side have of common right the property of the soil, and consequently the right of fishing *usque ad filum aquæ*, and the owners of the other side the right of soil or ownership, and fishing to the *filum aquæ* on their side. If a man is owner of the land on both sides, by common presumption he is owner of the whole river. *Hale de jure maris*. *Harg. Law Tracts*, 5.

A wall differs in point of ownership from a bank, being an artificial edifice, not formed from the materials of the place where it stands, and the property therefore of such wall is said to be in him who is bound to repair it, while the property in a bank follows that of the soil from which it is constructed. *Callis on Sewers*, 74, 4th ed. see *D. of Newcastle v. Clark*, 8 *Taunt.* 602.‡ Where A. licensed B. to build a bridge on his land, and B. covenanted to build the bridge for the public use and to repair it, it was held that the property in the materials of the bridge when built and dedicated to

* 3 *Eng. Com. Law Reps.* 433. † 14 *Id.* 50. ‡ 2 *Id.* 19. † 3 *Id.* 157.
‡ 4 *Id.* 219.

the public, continued in B., subject to the right of passage by the public, [and that when severed and taken away by a wrongdoer, B. might maintain trespass for the asportation. *Harrison v. Parker*, 6 East, 154, see *Spooner v. Brewster*, 3 Bingh. 139.* If two tenants in severalty build a party wall, one half of the thickness of which stands on the land of each, which is contributed by each under the building act, 14 G. III. c. 78; the wall ensues the nature of the land, and the owners of the lands are not tenants in common of the wall. *Matts v. Hawkins*, 5 Taunt. 20.† But in a case to which the building act does not apply, the common user of a wall separating adjoining lands belonging to different owners, is *primâ facie* evidence that the wall and the land on which it stands belong to the owners of the adjoining lands in equal moities as tenants in common. *Cubitt v. Porter*, 8 B. and C. 257.‡

Where two adjacent fields are separated by a hedge and ditch, the hedge *primâ facie* belongs to the owner of the field in which the ditch is not. If there are two ditches, one on each side of the hedge, then the ownership of the hedge must be ascertained by proving acts of ownership. *Per Bayley, J., Guy v. West*, 2 Selw. N. P. 1218. The rule with regard to ditching is this: no man making a ditch can cut into his neighbour's soil, but usually he cuts to the very extremity of his own land, he is of course bound to throw the soil which he digs out upon his own land, and after, if he likes it, he plants a hedge upon the top of it; therefore if he afterwards cuts beyond the edge of the ditch, he cuts into his neighbour's land and is a trespasser: no rule about four feet and eight feet has any thing to do with it. *Per Lawrence, J., Vowles v. Miller*, 3 Taunt. 138. The land which constitutes the ditch, in point of law, is part of the close, although it be on the outside of the bank. *Per Holroyd, J., Doe v. Pearsey*, 7 B. and C. 308.‡ Where lands abutting on a ditch and a lane on each side belong to different owners, the presumption is, that a hedge and ditch on one side, both belong to the occupier of the land on that side. *Per Bayley, J., Noye v. Reed*, 1 M. and R. 65.

It is said that if A. plants a tree at the extreme limits of his own land, and the tree growing, extends its roots into the land of B., A. and B. are tenants in common of the tree; but if all the roots grow in A.'s land, though the boughs shadow the land of B., the property is in A. *Per Holt, C. J., Waterman v. Soper*, 1 Ld. Raym. 737, B. N. P. 85, 2 Rol. Rep. 255; but according to another authority, if a tree grows in A.'s close, and roots in B.'s, yet the body of the main part of the tree being in the soil of A., all the residue of the tree belongs to him. *Masters v. Pollie*, 2 Rol. Rep. 141. In a late

* 11 Eng. Com. Law Reps. 69. † 1 Id. 4. ‡ 15 Id. 211. § 14 Id. 60.

case, *Littledale, J.*, ruled, that the tree belongs to him in whose soil it was first sown or planted. *Holder v. Coates*, 1 *M. and M.* 112.

Evidence of the locality of the premises.] The venue in this action is local, and therefore trespass will not lie for breaking and entering a house in Canada. *Doulson v. Matthews*, 4 *T. R.* 503. Although it is not necessary to name, or to specify the abutments of the *locus in quo*, yet if it be named or described by its abutments, a material variance will be fatal. Thus, if the description be "on the south side, abutting on the mill of A.," the plaintiff must prove a mill there in the tenure of A., but it will be sufficient, though there be a highway between them. 2 *Rol. Ab.* 678, l. 10, *B. N. P.* 89, *Gilb. Ev.* 237. Extreme strictness, however, is not observed in the proof of abutments; thus, if a close be described as abutting towards the east, but it proves to be north inclining to east, the proof is sufficient, 2 *Rol. Ab.* 678, l. 13, *Roberts v. Karr*, 1 *Taunt.* 501. Where the close is stated to be situated in a certain parish, the proof must correspond with the statement. *Taylor v. Hooman*, 1 *B. Moore*, 161.^a If it is stated to be in the parish of A., it is enough if A. has a church and overseers of its own, although, perhaps, strictly speaking, it may only be a hamlet; in such an action the court will not try a question of parochiality. *Anon.* 2 *Camph.* 4.

Evidence of trespass committed by defendant.] Trespass lies against the party who did the trespass, and all aiding him, *Com. Dig. Tresp.* (C. 1), and a person may become a trespasser by previous command, or where the trespass has been committed for his use and benefit, by subsequent assent, *Barker v. Braham*, 3 *Wils.* 377. Thus a person who sends out his hounds and his servants, and invites others to hunt with him, though he does not himself accompany them upon the plaintiff's land, is answerable for the trespass committed by them to the extent of the damage done by them. *Baker v. Berkeley*, 3 *C. and P.* 32;^a but a feme covert and an infant cannot make themselves trespassers, either by prior command or subsequent assent. *Co. Litt.* 180, *b. note* (4), 357, *b.* A master is not liable for the wilful trespass of his servant, 2 *Rol. Ab.* 553, l. 25. But where he orders his servant to do an act, the natural consequence of which is a trespass, and the servant uses ordinary care in the execution of the order, the master is liable, though he directs the servant to avoid the trespass. *Gregory v. Piper*, 9 *B. and C.* 591.^a A party is liable for the acts of his attorney, on proof of the retainer, as in the following case:—A. employed B. an attorney to enforce payment of a debt. B. directed his agent to sue out a *justicies* in the county court. Before the return of the *justicies* the debtor paid the debt and costs to B. His agent not knowing of such judgment, afterwards entered up judgment in the

^a 4 *Eng. Com. Law Reps.* 394. ^a 14 *Id.* 197. ^a 17 *Id.* 454.

County Court, although the defendant had not appeared, and sued out execution, under which the goods of the debtor were seized; it was held that both A. and B. were liable as trespassers. *Bates v. Pilling*, 6 B. and C. 38;* see also *Crook v. Wright, R. and M.* 278. The owner of animals *mansuetæ naturæ* is liable for trespasses committed by them in the land of another; *Keilo*. 3, b. *Com. Dig. Tresp. (C.)*; but a person from whose land animals *feræ naturæ*, as rabbits, &c. escape, is not liable for an injury done by them. *Boulston's case*, 5. Rep. 104, b. *Cooper v. Marshal*, 1 Burr. 259, and see *Mason v. Keeling*, 1 Ld. Raym. 608, *Latch*, 13, *Beckwith v. Shordike*, 4 Burr. 2093.

Where the defendant enters, &c. under an authority in law, the plaintiff may show that he has abused such authority, and so become a trespasser *ab initio*, but a mere non-feasance will not be such an abuse. *Six Carpenters' case*, 8 Rep. 146, a. A lessor who enters to view waste and does damage, or stays all night, a commoner who enters to view his cattle, and cuts down a tree, a man who enters a tavern and continues there all night against the will of the landlord, are all trespassers *ad initio*. *Com. Dig. Tresp. (C. 2)*. So an officer who neglects to remove goods attached, within a reasonable time, and continues in possession. *Reed v. Harrison*, 2 W. Bl. 1218, *Aitkenhead v. Blades*, 5 Taunt. 198.† A person distraining who remains in possession above the five days, and disturbs the party, is a trespasser, for the period only during which he remains in possession after the five days expired. *Winterbourne v. Morgan*, 11 East, 395, per *Le Blanc* and *Bayley, J. J.*, *Messing v. Kemble*, 2 Campb. 115. The abuse of an authority in fact will not in general render the party a trespasser *ab initio*. *Six Carpenters' case*, 8 Rep. 146, b. As to the replication of abuse, see *post*.

By stat. 6 Anne, c. 18, guardians, trustees, husbands, seized in right of their wives, and tenants, *pur autre vie* holding over without consent, are declared trespassers, but the act does not extend to tenants for years. *B. N. P.* 85.

Evidence under alia enormia, and in aggravation of damages.] In trespass for breaking and entering the plaintiff's house, evidence that the defendant also debauched the plaintiff's daughter has been allowed under *alia enormia*. Per *Holt, C. J.*, *Russell v. Corn*, 6 Mod. 127, *cases temp. Holt*, 699, *Sippora v. Basset*, 1 Sid. 225, *B. N. P.* 89. But it is said to be the safest and most convenient rule not to admit under this general averment, proof of such facts as the debauching of a daughter, which are entirely unconnected in their nature, and distinct from the substantive ground of the action (the trespass in entering the house), though in point of time, the one may have immediately followed the other. 2 *Phill. Evid.* 185, see

* 13 Eng. Com. Law Reps. 104. † 1 Id. 75.

ante, p. 300. In trespass for breaking and entering the house of the plaintiff, he may be allowed to give in evidence, that his wife was so terrified by the conduct of the defendant, that she was immediately taken ill, and soon afterwards died; but this evidence was held admissible only for the purpose of showing how outrageous and violent the trespass was, and not as a substantive ground of damage. *Huxley v. Berg*, 1 Stark. 98.* So where the plaintiff declared against the defendant for breaking and entering her house, and under a false charge that the plaintiff had stolen property in her house, ransacking and searching, &c. whereby she was injured in her credit, it was held that the declaration was good, and that the jury might give damages for the trespass as aggravated by the false charge. *Bracegirdle v. Orford*, 2 M. and S. 77. The jury may consider not only the mere pecuniary damage sustained by the plaintiff, but also the intention with which the fact has been done, whether for insult or injury. *Per Abbott, J., Sears v. Lyons*, 2 Stark. 318.^b See *Merest v. Harvey*, 1 Marsh. 139.

Evidence under the general issue.] Under the general issue the defendant may give evidence of title in himself, though a mere wrong-doer cannot show that the plaintiff has no property. *B. N. P.* 91. The defendant may under this plea prove the soil and freehold in himself, or that he held as tenant to the owner of the land, or that the plaintiff held as tenant to him (the defendant), and that his tenancy had expired at the time when, &c. *Dod v. Kyffin*, 7 T. R. 354, *Argent v. Durrant*, 8 T. R. 403, *Turner v. Meymott*, 1 Bingh. 158.^c So he may entitle himself to the possession, as the plaintiff's mortgagee for years, or as the lessee of such mortgagee. *Johnson v. Howson*, 2 M. and R. 226. So he may prove that the freehold and right of possession were in a third person, by whose command he entered. *Diersley's case*, 1 Leon. 301, 8 T. R. 408, *Gilb. Ev.* 255. The command must be proved; *Davies v. Lorimer*, *Lanc. Spring Ass.* 1824; but it has been ruled that the declarations of the owner, made after the trespass, are inadmissible to prove the command. *Garr v. Fletcher*, 2 Stark. 71.^d The defendant may also show, under the general issue, that he was tenant in common with the plaintiff, or that a third person by whose command he entered was tenant in common with the plaintiff. *Ross's case*, 3 Leon. 83, *Gilb. Ev.* 235. But where the subject matter which was held in common has been destroyed, tenancy in common is no defence, as where one tenant in common grubs up and destroys a hedge. *Voyce v. Voyce*, *Gow*, 201.

In general every matter of justification or excuse must be pleaded specially, as a right of common, *Co. Litt.* 283, a; a right of way or easement, *Vin. ab. Ev. (Z. a).* *Gilb. Ev.* 251; defect of fences, *Co. Litt.* 283, a; a license, *Gilb. Ev.* 249; an authority in law, *Com. Dig.*

* 2 Eng. Com. Law Reps. 313. ^b 3 Id. 363. ^c 8 Id. 280. ^d 3 Id. 250.

Pleader (3 M. 35); and so of all matters in discharge of the action as accord and satisfaction. *Bird v. Randall*, 3 Burr. 1353. But by various statutes particular persons are enabled to give the special matter in evidence under the general issue, parties distraining for rent arrear by 11 G. II. c. 19, s. 21, justices of the peace, mayors, constables, &c. by 7 Jac. I. c. 5, churchwardens and overseers by 21 Jac. I. c. 12. See *ante*, p. 369.

Under the general issue the defendant cannot prove as a bar that the plaintiff is jointenant, or tenant in common of the *locus in quo* with a third person, which is matter of plea in abatement. *Brown v. Hedges*, 1 Salk. 290. B. N. P. 91. *Gilb. Ev.* 234. But he may give such evidence in order to reduce the plaintiff's damages *pro tanto*. *Nelthorpe v. Dorrington*, 2 Lev. 113. B. N. P. 35. So he may show other circumstances which he could not have pleaded in mitigation, as in trespass for cutting trees, that they were applied to purposes for which the plaintiff had covenanted to furnish timber. *Rennel v. Wither*, *Manning's Index*, 201. 2d Ed.

Evidence on the plea of liberum tenementum.] Where the defendant pleads *liberum tenementum*, that the *locus in quo* is his soil and freehold, or the soil and freehold of a third person by whose command he entered, the issue is upon him, and he must prove it either by direct evidence of title, or by the presumptive evidence of title arising from acts of ownership, &c. Where the plaintiff has declared generally for a trespass to his close in A. without naming the close, and the defendant has pleaded *lib. ten.* upon which the plaintiff has taken issue, it will be sufficient for the defendant to prove a freehold in himself any where in A. which will entitle him to a verdict. *Hehois v. Lamb*, 2 Salk. 453, *Goodright v. Rich*, 7 T. R. 355, 1 Saund. 209, b (n). The plaintiff in such case should have new assigned, setting out the name or abutments of the *locus in quo*. But if the plaintiff names the real name of the close in his declaration, and the defendant pleads *lib. ten.* generally without setting out the abutments of the close, upon which issue is joined, the plaintiff may recover on proving a trespass done to a close in his possession, bearing the name stated in the declaration, though the defendant may have a close in the same parish known by the same name; and it will not therefore be necessary for the plaintiff to new assign. *Cocker v. Crompton*, 1 B. and C. 489.¹

Evidence under plea of justification generally.] Where to a plea of justification the plaintiff has replied *de injuriâ suâ propriâ absque tali causâ*, the whole matter of the plea is put in issue, and must be proved, so far as it is material to constitute a justification. The plaintiff declared for breaking and entering his dwelling-

¹ 8 Eng. Com. Law Reps. 140.

house, assaulting and imprisoning him, and during his imprisonment assaulting, striking, and pushing him in a violent manner, and the defendant pleaded a justification under a writ and warrant, under which he entered, &c. and arrested, &c. and because the plaintiff, after he had been so taken into custody under and by virtue of the said writ and warrant, behaved and conducted himself in a violent and outrageous manner, and could not otherwise be kept in a safe and proper manner, the defendant was obliged to push and pull about the plaintiff, &c. and to give him a few blows, &c. A battery during the imprisonment was proved, but the defendant, though he proved the arrest, gave no evidence of outrageous conduct by the plaintiff while in custody, and it was held that the plea was not proved. *Phillips v. Hovegate*, 5 B. and A. 220.^a But where the plea consists of two facts, either of which, if separately pleaded, amounts to a good defence, it will be sufficient for the defendant to prove either of those facts. *Spilsbury v. Micklethwaite*, 1 Taunt. 146. And it is sufficient to prove a justification which covers the trespass, although it does not cover the matter of aggravation. Thus where the plaintiff declares for breaking, entering, and expelling, and the defendant justifies only the breaking and entering, it is sufficient, for the breaking and entering are the gist of the action, and the expulsion is only matter of aggravation; if the plaintiff had wished to take the advantage of the expulsion, he should have shown the special matter in a new assignment. *Taylor v. Cole*, 3 T. R. 292, 1 H. Bl. 555, S. C. So where to trespass for breaking and entering a house, and staying therein three weeks, the defendant pleaded a justification, as to breaking, and entering, and staying in the house twenty-four hours, and it was proved that he stayed in the house more than twenty-four hours, Lord Ellenborough held that the justification was proved, and that if the plaintiff meant to rely upon the excess beyond the twenty-four hours, he ought to have said so by a new assignment. *Monprivatt v. Smith*, 2 Campb. 175, see also *Lambert v. Hodson*, 1 Bingh. 317,^a 1 Saund. 28, a (n).

Evidence on plea of right of way.] The cases in which the grant of a way, ante, p. 16, and the dedication of a way to the public, ante, p. 17, will be presumed, have been already stated. If the defendant plead a right of way, and the plaintiff deny the right, the latter may give in evidence that the way has been stopped by order of two justices; but the order must pursue the form prescribed by statute, and any material variance will be fatal. *Davison v. Gill*, 1 East, 64, *Welsh v. Nash*, 8 East, 394, *De Ponthieu v. Pennyfeather*, 5 Taunt. 634.^a On the traverse of a prescriptive right of way, the defendant may prove that the way was extinguished by unity of possession. *Whalley v. Thompson*, 1 B. and P. 371. Un-

^a 7 Eng. Com. Law Reps. 74. ^a 8 Id. 333. • 1 Id. 217.

der a traverse of the right of way the plaintiff will not be allowed to show that the trespass committed by the defendant was not covered by the supposed right of way. Thus where the defendant pleaded that he was seised in his demesne as of fee of a messuage, &c. in the parish, and that he and all those whose estate, &c. had a right of way for himself, &c. his and their farmers and tenants, occupiers of the messuage, &c. over the *locus in quo* to and from the messuage, &c. as appertaining thereto, and the plaintiff traversed the prescriptive right, it was held that the defendant's showing that he was seised in fee of an ancient messuage in the parish, to which a right of way, as pleaded over the *locus in quo*, belonged, was evidence sufficient to support his plea, though the messuage was let to, and in the occupation of a tenant, and the defendant only occupied a new-built house in the parish, at the time of the trespass committed. *Stott v. Stott*, 16 East, 343. If the plaintiff meant to insist that the right stated would not cover the exercise of a right of way to the new house, he should have done so either by a new assignment or by a special replication to that effect. *Ibid.* 349. In some cases it is proper both to reply and to plead a new assignment. Where the plea on the face of it professes to answer the whole matter of the declaration, but in fact only answers part, as where to a declaration for a trespass to a close called A. the defendant pleads a right of way over A. and in the exercise of such right justifies the acts complained of, but in fact the defendant not only committed the acts complained of in that part of A. over which the alleged way passes, but also in other parts of A. the plea, as it has been said, has only "hit some of the places wherein the plaintiff intended the trespass," and the trespasses in the other parts of the close remained unanswered, see *Prettyman v. Lawrence*, Cro. Eliz. 812, *Odeham v. Smith*, Cro. Eliz. 589. If therefore the plaintiff is desirous of denying the right of way, thinking that he can recover for the trespasses justified in the plea, as well as for those which are not *in fact* justified, but only appear to be so, he may traverse the right, and may at the same time new-assign *extra viam*, and thus entitle himself to give evidence of trespasses committed in every part of the close.

Where the defendant pleads that A. B. was seised in fee, and being so seised, granted a right of way by non-existing grant, and the plaintiff traverses the grant, it is not competent for the plaintiff upon that issue to show that A. B. was not seised in fee, for the purpose of rebutting the presumption of the grant, he being estopped by the admission on record. *Cowlesham v. Cheslyn*, 1 Crom. and Jer. 48.

A plea of right of way stated a surrender to the defendant of a copyhold, with all ways then used by the tenants and occupiers

thereof, and that the defendant was admitted and continued seised, and being so seised and having occasion to use the way, committed the trespass. The replication traversed the right of way being used at the time of the surrender, and there was a new assignment that the defendant used the way for other purposes, to which the defendant pleaded not guilty. The right of way was established in evidence, but it appeared that when the trespass was committed, the tenement, in respect of which the way was claimed, was in the possession of a tenant, and that the defendant as landlord went over the *locus in quo* to assert a right to the way which had been obstructed. The court held that the defendant had a right so to use the way, and that the language of the plea comprehended all the purposes for which a person seised of the tenement might lawfully use the way. *Proud v. Hollis*, 1 B. and C. 8.*

Evidence on plea of right of common.] On a right of common pleaded, the plaintiff may either deny the prescriptive or other right stated in the plea, or he may traverse the measure of the common, viz. that the cattle were the defendant's own cattle, and that they were *levant* and *couchant* upon the premises and commonable cattle. *Robinson v. Raley*, 1 Burr. 316. B. N. P. 93. But under this replication the plaintiff will fail if it appear that some of the cattle were the defendant's commonable cattle *levant* and *couchant*, for the number mentioned in the declaration is not material, 1 Saund. 346, *e* (n), *Ellis v. Rowles, Willes*, 638. The plaintiff in such case should new assign. The plaintiff may also reply an approvement of the common, if it be common of pasture, *Glover v. Lane*, 3 T. R. 445, 1 Saund. 353, *b* (n), or that the common has been enclosed for upwards of twenty years, and if issue be taken on this replication, and it appear in evidence that any part of the common has been enclosed less than twenty years, the plaintiff will fail. *Hawke v. Bacon*, 2 Taunt. 156. And it has lately been held, that upon issue joined on the right of common, the plaintiff may prove a custom for the lord of the manor to enclose parcels of the waste, and a grant to himself of the *locus in quo* under such custom. *Arlett v. Ellis*, 7 B. and C. 346.*

Where in trespass for breaking and entering the plaintiff's close, the defendant in his plea prescribed in right of a messuage and land, for a right of common of pasture on a down or common, whereof the close, &c. before the wrongful separation thereof, was parcel, and justified the trespass, because the close in which, &c. was wrongfully enclosed and separated from the rest of the common, and the plaintiff replied, that the close in the declaration mentioned, in which &c. was a close called *Burgey Cleave Garden*, and had for thirty years and more been separated, and divided and enclosed from the common, and occupied and enjoyed all that time in

severalty, and adversely to the person holding the message and land, in respect of which the right of common was claimed, and the defendant rejoined that the close in which, &c. had not been occupied or enjoyed for thirty years or upwards, in severalty or adversely, as alleged in the replication; and the jury found that part of the garden had been enclosed within the thirty years, and that the alleged trespass was committed in that part of the garden only; it was held that upon this finding the defendant was entitled to the verdict, whether the words of the issue, "the close in which," &c. constituted an entire or divisible allegation; if it was an entire allegation it comprehended the whole of the enclosure to which the name of *Burgey Cleave Garden* attached, and in that case the plaintiff was bound to prove that the whole of the garden had been enclosed upwards of thirty years, or if it was a divisible allegation, it was confined in its meaning to that spot in which the trespass had been committed, and the jury having found that the spot had not been enclosed thirty years, it was immaterial whether the rest had been so or not. *Richards v. Peake*, 2 B. and C. 918.*

Evidence on plea of license.] If to a plea of license, the plaintiff reply a denial of the license, the defendant must prove a license sufficient to entitle him to commit the act complained of. The keeping open of the doors of a house in which there is a public billiard table, is a license in fact to all persons to enter for the purpose of playing. *Ditcham v. Bond*, 3 Campb. 525. It is not sufficient to show a license by a servant, unless it be in law the license of the master, *Hoddingshaw v. Rag*, Cro. Eliz. 876; or by a wife; *Taylor v. Fisher*, Cro. Eliz. 245; or by a daughter, *Cock v. Wortham*, Scho. N. P. 1040. A license includes, as incident to it, a power to do every thing without which the act licensed cannot be done. Thus if A. licenses B. to enter his house to sell goods, B. may take assistants, if necessary, for the purpose of selling the goods, and if it be pleaded that B. and C. and D. his servants, by his command entered for that purpose, and necessarily continued there for so long, it will be intended that it was necessary for them all to enter, *Dennet v. Grover*, Willes, 195; but an authority from a tenant to his landlord, in the absence of the former, to let the premises, will not justify the landlord in entering the premises (the key being lost) through a window, by means of a ladder, in order to show the house. *Ancaaster v. Milling*, 2 D. and R. 714.*

If the plaintiff in fact did license the defendant, and the defendant has exceeded the license, such fact cannot be given in evidence under a denial of the license, but should be new assigned; *Ditcham v. Bond*, 3 Campb. 524, 1 Saund. 300, d (n); but it seems that where the defendant pleads that he committed the trespass

complained of with the license of the plaintiff, a revocation of the license may be proved upon an issue joined upon this plea, for it shows that there was no license at the time of the trespass. *Per Best, C. J., and Holroyd, J., Bridge v. Seddall, Derby, Sp. Ass. 1827; 2 Phill. Ev. 194, 7th Ed., but see Serjeant Williams' note, 1 Saund. 300, d.* And so where a man abuses an authority in law, whereby he becomes a trespasser *ab initio*, such abuse must be replied. *1 Saund. 300, d (n).* On the other hand, where the plaintiff means to deny the justification set up in the plea, he must take issue upon it and not new assign. Thus, where the defendant pleads an entry to abate a nuisance, and the plaintiff new assigns unnecessary violence, he will not be allowed to give evidence to negative the nuisance. *Pickering v. Rudd, 1 Stark. 56.* And where the declaration states the trespasses to have been committed on divers days and times, and the defendant pleads a license, to which the plaintiff replies *de injuriâ suâ propriâ absque tali causâ*, the defendant must show a license co-extensive with the trespasses proved, and the plaintiff will succeed, unless the defendant can show a license for each trespass proved by the plaintiff. *Barnes v. Hunt, 11 East, 451.*

Evidence under new assignment.] A new assignment waives and abandons the trespass which the defendant has justified. *1 Saund. 299, c (n).* Therefore where the defendant pleads *lib. ten.* and the plaintiff new assigns, the defendant ought not to plead that the place mentioned in the new assignment is the same as that mentioned in the plea, but if in truth they are the same, the defendant should plead *not guilty*, and the plaintiff will not be allowed to give evidence of any trespasses committed in the place mentioned in the plea. *Pratt v. Groome, 15 East, 235, B. N. P. 92.* So where the defendant pleaded that the place where, &c. was part of a common which had been allotted to him, to which the plaintiff new assigned that the trespass complained of was in another place, upon its being stated in the opening of the plaintiff's counsel to the jury that the trespass was in the same place, but that the defendant had no title to it, it was held that the plaintiff could not recover. *Anon. cited 16 East, 86.* So if the defendant justifies under legal process, which is in fact irregular, and the plaintiff, instead of traversing the plea, new assigns that the trespass complained of was on another and different occasion, such new assignment admits the justification stated in the plea, and if the plaintiff can only prove one trespass, that trespass will be covered by the plea, and the defendant will be entitled to a verdict. *Oakly v. Davis, 16 East, 82, and see Atkinson v. Matteson, 2 T. R. 176, ante, p. 371.*

On the other hand, if there were in fact two trespasses, and there is only one count in the declaration, and the defendant had pleaded

¹ 2 Eng. Com. Law Reps. 293.

a justification which he can prove, though he cannot prove a justification to both trespasses, the plaintiff must new assign, for the defendant will be entitled to a verdict on proving his justification, and the plaintiff cannot give evidence of the other trespass, *see ante*, p. 370. So where the plaintiff relies on an excess by the defendant, he must new assign such excess, *ante*, p. 370.

In some cases, as already stated, *ante*, p. 313, the plaintiff may both reply and new assign, and will, if he succeeds, be entitled to recover for the trespasses attempted to be justified in the plea, as well as for those covered by the new assignment. But the plaintiff cannot both reply and new assign, where the plea in fact covers the whole of the trespasses which can be proved under the declaration. Thus where in trespass for stopping the plaintiff's cattle and cart on a particular day, the defendant pleaded in justification that the plaintiff was loading his cart with turf wrongfully cut from a waste, and that he, as a bailiff of the lord, took it from him, to which the plaintiff replied *de injuriâ*, &c. and new assigned trespasses on other days, it was held that the plaintiff could not both reply and new assign. *Taylor v. Smith*, 7 *Taunt.* 156, *Cheasty v. Barnes*, 10 *East*, 73.

Where the defendant justifies and the plaintiff relies upon an act which renders the defendant a trespasser *ab initio*, such act should be replied, for should the plaintiff new assign that the trespass is a different trespass, he cannot recover, since he can only prove one continued act of trespass, the justification of which is admitted by the new assignment. *Aikinhead v. Blades*, 5 *Taunt.* 198.* Nor can the plaintiff in such case, recover under a replication of *de injuriâ suâ propriâ absque tali causâ*. *Lambert v. Hodgson*, 1 *Bingh.* 317.†

TRESPASS FOR MESNE PROFITS.

In an action of trespass for mesne profits, which may be brought in the name of the lessor of the plaintiff in ejectment, or (where the record in ejectment is evidence of the title) in the name of the nominal plaintiff, the plaintiff must prove, 1. His title. 2. His re-entry. 3. The defendant's liability; and 4. The amount of damages.

Evidence of title.] The judgment in ejectment is sufficient proof of title for the plaintiff in this action, whether it be brought by the lessor of the plaintiff, or by the nominal plaintiff, against all who are parties to such judgment, and whether the judgment in ejectment be upon verdict or by default, *Aslin v. Packer*, 2 *Burr.* 665, *B. N. P.* 87; but it is only evidence of title from the time of the

* 1 *Eng. Com. Law Reps.* 75. † 8 *Id.* 333.

demise laid in the declaration in ejectment, and therefore if the plaintiff seeks to recover damages anterior to that time, it will be necessary for him to give further evidence of his title. *B. N. P.* 87. The judgment in an action of ejectment on the several demises of two or more persons, will be evidence of title for them in a joint action of trespass brought by them. *Chamier v. Clingo*, 5 *M. and S.* 64. The judgment may be proved by an examined copy, *ante*, p. 44.

Evidence of re-entry.] As the plaintiff's right to recover damages for the time during which he was out of possession depends upon the proof of re-entry, which operates to re-vest the possession in him *ab initio*, *vide ante*, p. 307, such re-entry must be proved. Where the action is brought against a person who was party to the ejectment, and entered into the consent rule, proof of the judgment in ejectment is said to be sufficient, without proving the writ of possession executed, because by entering into the rule to confess, the defendant is estopped both as to the lessor and lessee, so that either may maintain trespass without proving an actual entry, *B. N. P.* 87. But where the judgment is against the casual ejector, and no rule therefore has been entered into, the lessor cannot maintain trespass without an actual entry, and therefore ought to prove the writ of possession executed, *B. N. P.* 87, which is done by producing an examined copy of the writ and of the sheriff's return. The plaintiff may also prove a re-entry by showing that he was let into possession with the consent of the defendant. *Calvert v. Horsfall*, 4 *Esp.* 167.

Evidence of defendant's liability.] The plaintiff must prove the defendant's liability by showing him in possession of the premises. For this purpose the judgment in ejectment will be evidence against one who was a party to it, though not against a stranger, and therefore a judgment in ejectment against a wife cannot be given in evidence against her husband. *Denn v. White*, 7 *T. R.* 111. And where after judgment by default against the casual ejector, an action for the mesne profits was brought against the landlord, who had been in the receipt of the rents and profits from the day of the demise, Lord Ellenborough ruled that the judgment in ejectment was not evidence against the defendant without notice of the ejectment, but that a subsequent promise by him to pay the rent and costs, amounted to an admission that he was a trespasser, and that the plaintiff was entitled to the possession. *Hunter v. Britts*, 3 *Campb.* 455. Though the judgment in ejectment is evidence to show the liability of the defendant, yet it is no evidence of the time during which the defendant has been in possession; the consent rule admits possession by the defendant at the time of the service of the

declaration; but if the plaintiff seeks damages for an earlier period, he must give further evidence of the possession. *Doe v. Gibbs*, 2 C. and P. 615.*

The damages.] The plaintiff must be prepared to prove the value of the mesne profits, and he may recover not only the actual mesne profits, but also damages for his trouble, &c. *Goodtitle v. Toombs*, 3 Wils. 121. So he may recover the amount of the taxed costs of the ejectment, but not any extra costs. *Doe v. Davis*, 1 Esp. 358, *Brook v. Brydges*, 7 B. Moore, 471.† The plaintiff may recover, by way of damages, costs incurred by him in a court of error in reversing a judgment in ejectment obtained by the defendant. *Nowell v. Roake*, 7 B. and C. 404.‡

Defence.

If the plaintiff seeks to recover the mesne profits for more than six years, the defendant may plead the statute of limitations. *q. N. P.* 88. But bankruptcy is no defence, the demand being for unliquidated damages. *Goodtitle v. North*, Dougl. 584. Under the general issue the defendant cannot give in evidence that the plaintiff accepted the rent of the premises for the time in dispute, and agreed to waive the costs of the ejectment. *Doe v. Lee*, 4 Taunt. 459. Where he is not concluded by the record in ejectment, the defendant may controvert the plaintiff's title.

Recovery of the mesne profits in ejectment.] By stat. 1 Geo. IV. c. 87, s. 2, whenever it shall appear on the trial of an ejectment, at the suit of a landlord against a tenant, that the tenant or his attorney has been served with due notice of trial, the plaintiff shall not be non-suited for default of the defendant's appearance, or of confession of lease entry and ouster, but the production of the consent rule and undertaking of the defendant, shall in all such cases be sufficient evidence of lease entry and ouster, and the judge, before whom the cause is tried, shall permit the plaintiff (whether the defendant shall appear upon such trial or not), after proof of his right to recover possession of the whole, or of any part of the premises mentioned in the declaration, to go into evidence of the mesne profits, from the day of the expiration or determination of the tenant's interest, down to the time of the verdict given in the cause, or to some preceding day, to be specially mentioned therein; and the jury on the trial, finding for the plaintiff, shall, in such case, give their verdict upon the whole matter, both as to the recovery of the whole or any part of the premises, and also as to the amount of the damages to be found for the mesne profits;

* 12 Eng. Com. Law Reps. 218. † 17 Id. 86. ‡ 14 Id. 61.

provided that this shall not be construed to bar any landlord from bringing an action of trespass for the mesne profits which shall accrue from the verdict, or the day therein specified, down to the day of the delivery of possession of the premises recovered in the ejectment.

TROVER.

THE plaintiff in an action of trover must prove, 1. A general or special property in the goods, or as against a wrong-doer a possession of them; 2. An actual or constructive possession, or right of possession; and 3. A conversion by the defendant. 4. The value.

Evidence of general property in the goods.] Where it is necessary to prove the property in the goods, as where the right to them is disputed, the evidence for the plaintiff will depend upon the nature of his particular title. Where there is both a general and a special owner, but the general owner has not transferred his right to the possession, he may still maintain this action; thus where he has delivered the goods to a carrier or other bailee, and so parted with the actual possession, he may still maintain trover for a conversion by a stranger, for the owner retains the possession in law, as against a wrong-doer, and the carrier or other bailee is only his servant. *Gordon v. Harper*, 7 T. R. 12, 2 Saund. 47, b (n). And if the bailee of goods for a special purpose transfers them to another in contravention of that purpose, the general owner may maintain trover against that person, though he be a *bonâ fide* vendee, unless the goods have been sold in market overt. *Wilkinson v. King*, 2 Campb. 335, *Loeschman v. Machin*, 2 Stark. 311,* but see 2 Saund. 47, b (n).

Evidence of general property—vesting of the property.] With regard to the time at which the property passes on the sale of goods, it is laid down in a very recent case, that where goods are sold,* and nothing is said as to the time of the delivery, and the time of payment, and every thing the seller has to do with them is complete, the property vests in the buyer, so as to subject him to the risk of any accident which may happen to the goods (see *Tarling v. Baxter*, 6 B. and C. 360),* and the seller is liable to deliver them whenever they are demanded, upon payment of the price, but the buyer has no right to have possession of the goods till he pays the price. If the goods are sold upon credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of possession and the

* 3 Eng. Com. Law Reps. 359. • 13 Id. 199.

right of property vests at once in him, but his right of possession is not absolute, it is liable to be defeated if he becomes insolvent before he obtains possession. *Per Bayley, J., Bloxam v. Sanders*, 4 B. and C. 984.¹ Where goods in bulk are sold at so much a ton, the property in them does not pass by the sale before they are weighed; *Simmons v. Swift*, 5 B. and C. 857;² and if the contract be within the statute of frauds, and there is no note or memorandum, acceptance or earnest, the contract is by that statute not good, and no property passes. See *Bloxame v. Williams*, 3 B. and C. 234,⁴ and see *ante*, p. 216. So the property in goods passes on a sale by auction, though they are not to be delivered till certain duties are paid by the seller. *Hind v. Whitehouse*, 7 East, 571, and see *Phillimore v. Barry*, 1 Campb. 513, *Noy's Max.* 88. Where a quantity of iron was to be delivered, under a contract that certain bills outstanding against the seller should be taken out of circulation, and after a part of the iron had been delivered, and no bills had been taken out of circulation, the seller brought trover for the part delivered, it was held that it being only a conditional delivery, and the condition being broken, the action might be maintained; and *per Bailey, J.*, if a tradesman sells goods to be paid for on delivery, and his servant by mistake delivers them without receiving the money, he may, after demand and refusal to deliver or pay, bring trover for his goods against the purchaser. *Bishop v. Shikito*, 2 B. and A. 329 (n). So the property which passed by the sale may be devested by the rescinding of the contract. Thus where A. sold goods to B. and afterwards and before the delivery to B., C. became possessed of the goods, and on being informed of the circumstances, declared that he would not deliver them to any person whatever, it was held that A. having repaid B. might maintain trover against C., the contract between A. and B. being rescinded, and A. being remitted to his former right. *Pattison v. Robinson*, 5 M. and S. 105. Where A. is indebted to C. and B. to A. and it is agreed between them that B. shall deliver goods to C. in satisfaction of A.'s debt, and B. converts them to his own use, C. may maintain trover for the goods, though he never had possession, for by the agreement the right is in him. *B. N. P.* 35.

Where A. agrees to build a ship for B. and it is part of the terms of the contract that given portions of the price shall be paid according to the progress of the work, the payment of those instalments appropriates specifically to B. the very ship in progress, and vests in him a property in that ship. *Woods v. Russel*, 5 B. and A. 942.⁵ But where goods are ordered to be made, as long as the order is not executed, but only in a course of execution, no property in general passes to the person for whom they are made. *Bishop v. Crawshay*, 3 B. and C. 419.⁶ *Mucklow v. Mangles*, 1 Taunt.

¹ 10 Eng. Com. Law Reps. 477. ² 12 Id. 388. ³ 10 Id. 60. ⁴ 7 Id. 310.
⁵ 10 Id. 136.

318. See *Carruthers v. Payne*, 5 Bingh. 270.* *Atkinson v. Bell*, 8 B. and C. 283,¹ ante, p. 223, *Goode v. Langley*, 7 B. and C. 26.¹

By a gift of goods the property does not pass, unless the gift be by deed or instrument of gift, or be executed by an actual delivery of the thing given to the donee. *Irons v. Smallpiece*, 2 B. and A. 551. But if A. in London gives J. S. his goods at York, and another takes them away before J. S. obtains actual possession, J. S. may, it is said, maintain trover or trespass for them. *Br. Ab. Trespass*, 303, *Hudson v. Hudson, Latch*, 214, 2 Saund. 47, a (n), *sed quære*.

By a fraudulent or illegal sale or transfer of goods no property passes, as where a wharfinger without leave of the owner sells goods in his possession. *Wilkinson v. King*, 2 Campb. 335. So where in case of a sale of live pheasants, no property passes, the 58 G. 3, c. 75, prohibiting the buying. *Helps v. Glenister*, 8 B. and C. 553.* So where a person obtains goods upon false pretences, under colour of purchasing them, the property is not changed. *Noble v. Adams*, 7 Taunt. 59.¹ *Kilby v. Wilson, R. and M.* 178. So where stolen goods are pawned, the property is not altered, *Parker v. Gillies*, 2 Campb. 336, (n); and by stat. 1 Jac. I. c. 21, s. 5, sale of any goods wrongfully taken to any pawnbroker in London, or within two miles thereof, shall not alter the property. But if stolen goods are sold in market overt, the property is divested out of the owner. Thus where stolen goods were purchased in market overt, and sold by the purchaser before the felon was convicted, it was held that the owner of the goods prosecuting to conviction, could not maintain trover against the purchaser who had so sold, under the statute 21 H. VIII. c. 11, which gives restitution to the owner who prosecutes the felon to conviction, although he gave the purchaser notice of the robbery while the goods were in his possession; for the property being altered by the sale in market overt, was not re-vested in the owner till the conviction of the felon, but the defendant had parted with the possession before that time, and therefore could not be said to have converted the plaintiff's goods. *Horwood v. Smith*, 2 T. R. 750; and see *Parker v. Patrick*, 5 T. R. 175. In trover for stolen property it does not seem to be necessary for the plaintiff to show the mode by which it passed out of his hands. See *Down v. Halling*, 4 B. and C. 334.*

By a writ of execution the property in the goods is not altered until execution executed. The meaning of the words that the goods shall be bound by the delivery of the writ to the sheriff, is that after the writ is so delivered, if the defendant make an assignment of the goods, unless in market overt, the sheriff may take them in execution. *Per Lord Hardwicke, Louthal v. Tomkins*, B. N. P. 91, and see *R. v. Alnutt*, 16 East, 278.

By a judgment for damages in trover, and satisfaction of the

* 15 Eng. Com. Law Reps. 447. ¹ 15 Id. 216. ¹ 14 Id. 9. ¹ 15 Id. 295.

¹ 2 Id. 25. = 10 Id. 347.

damages, the property in the goods taken is vested in the defendant, *Adams v. Broughton*, 2 Str. 1078, *Morris v. Robinson*, 3 B. and C. 206,* where the full value of the article has been recovered; but unless the full amount is recovered the judgment will not bar even other actions of trover. *Per Holroyd, J., Ibid.* So judgment for the plaintiff in replevin in the *detinet* for damages, vests the property of the goods in the defendant. *Moore v. Watts*, 1 Lord Raym. 614.

An executor or administrator has the property of the goods of the testator or intestate vested in him before his actual possession; *Com. Dig. Administration*, (B. 10), and though administration be not granted for a long time, yet when it is granted it vests the property in the administrator, by relation from the time of the death of the *intestate*. *Ibid.* 2 Rol. Ab. 554, l. 15. 25, *R. v. Horsley*, 8 East, 410, but see *Woolley v. Clark*, 5 B. and A. 764,* where it is said *per Abbott, C. J.* that the property of the deceased vests in the administrator only from the time of the grant of the letters of administration, but that it vests in an executor from the moment of the testator's death.

If a man take the goods of another by wrong, the property is not altered. *Com. Dig. Biens (E)*. Nor will the property in goods pass by an award. *Hunter v. Rice*, 15 East, 100.

Questions have frequently arisen as to the passing of property in bank notes, promissory notes, and other securities for money. The general rule is, that bank notes or bills, drafts on bankers, bills of exchange, or promissory notes, either payable to order or indorsed in blank, or payable to bearer, when taken *bonâ fide*, and for a valuable consideration, pass by delivery, and vest a right thereto in the transferee, without regard to the title or want of title in the person transferring them. *Per Holroyd, J., Wookey v. Pole*, 4 B. and A. 9.* Citing *Miller v. Race*, 1 Burr. 452, *Grant v. Vaughan*, 3 Burr. 1516, *Peacock v. Rhodes*, Doug. 636. So exchequer bills, *Wookey v. Pole*, 4 B. and A. 1* ; and Prussian bonds, *Gordier v. Melville*, 3 B. and C. 45.* But in these cases it is a question of fact for the jury, under all the circumstances of the case, whether the bill, &c. has been taken *bonâ fide* or not, and whether due and reasonable caution has been used by the person taking it. *Per Holroyd, J., Gill v. Cubitt*, 3 B. and C. 477.* Where a Bank of England note for 1000*l.* dated 12th Oct. 1820, was lost in London in April, 1821, and in June, 1822, was presented for change to a banker in Liverpool, by a person with whom the latter was well acquainted, but who was then in pecuniary difficulties, and he changed it by giving bills which had some time to run, and cash, deducting a commission, without asking any questions how the holder came possessed of it, *Holroyd, J.* told the jury that if they were of opinion that the defendant received the note fairly and *bonâ*

* 10 Eng. Com. Law Reps. 49. * 7 Id. 219. * 6 Id. 326. * 10 Id. 16.

* 10 Id. 158.

vide, in the ordinary course of business, and had given full value for it, he would be entitled to a verdict; but if on the other hand, he had received it out of the ordinary course of business, and had not in fact given the full value for it, then the plaintiffs would be entitled to a verdict. The jury having found for the plaintiffs, the court refused a new trial. *Egan v. Threlfall*, 5 D. and R. 326 (n).^a So where a bill of exchange was stolen during the night, and taken to the office of a discount broker early on the following morning, by a person whose features were known, but whose name was unknown to the broker, and the latter being satisfied with the name of the acceptor, discounted the bill according to his usual practice, without making any inquiry of the person who brought it, it was held, that in an action on the bill, by the broker against the acceptor, the jury were properly directed to find a verdict for the defendant, if they thought that the plaintiff had taken the bill under circumstances which ought to have excited the suspicion of a prudent and careful man, and the jury having found for the defendant, the court refused to disturb the verdict. *Gill v. Cubitt*, 3 B. and C. 466.^a The owner of a check upon a banker for 50*l.* having lost it by accident, it was tendered five days after the date to a shopkeeper in payment of goods purchased to the value of 6*l.* 10*s.* and he gave the purchaser the amount of the check after deducting the value of the goods purchased. The shopkeeper the next day presented the check at the banker's, and received the amount. It was held, that in an action brought by the person who had lost the check, against the shopkeeper, to recover the value of the check, the jury were properly directed to find for the plaintiff if they thought the defendant had taken the check under circumstances which ought to have excited the suspicion of a prudent man, and secondly, that the shopkeeper having taken the check five days after it was due, it was sufficient for the plaintiff to show that he once had a property in it, without showing how he lost it. *Down v. Halling*, 4 B. and C. 330.^a So where the plaintiffs were robbed of a Bank of England note for 500*l.* which the defendants, bankers in a small town, some months afterwards, discounted for a stranger, a respectable-looking man, by giving him 500*l.* worth of their own notes, in trover for the note, Best, C. J., left it to the jury to determine, as well whether the plaintiff had acted with due diligence in circulating intelligence of the robbery, as whether the defendant had exercised sufficient caution, and had observed the usual course of business in exchanging the note; the jury having found for the plaintiff, the court of Common Pleas refused a new trial. *Snow v. Peacock*, 3 Bingham, 406.^a See *Snow v. Leatham*, 2 C. and P. 314.^a *Snow v. Saddler*, 3 Bingham, 610.^a The plaintiff left in a hackney-coach in London, and lost her reticule containing a 100*l.* bank post

^a 16 Eng. Com. Law Reps. 237. ^a 10 Id. 154. ^a 10 Id. 347. ^a 13 Id. 25.

^a 12 Id. 142. ^a 13 Id. 69.

bill indorsed in blank, and issued hand-bills proclaiming her loss. The defendant, a banker at Brighton, who had never heard of the loss, cashed the bill for a stranger eight days afterwards. The stranger on being asked his name said he was on a journey, and wrote on the bill a fictitious address in an illiterate hand. The defendant did not inquire where he was staying. It was held that the defendant was liable to the plaintiff for the amount of the note. *Strange v. Wigney*, 6 Bingh. 677.⁷ Where a bill has been stolen, the owner must give notice immediately in order to apprise the public of the loss. When the owner of a bill was robbed of it, eight days before it became due, and did not give notice of his loss till the end of seven days, and then only to the acceptor, Best, C. J. left it to the jury to say whether the plaintiff had done all he ought to do in order to apprise the public of the loss; and whether the defendant had acted *bonâ fide* and with sufficient caution; the jury having found a verdict for the defendant, the court of Common Pleas refused a new trial. *Beckwith v. Corroll*, 2 C. and P. 261,⁸ 3 Bingh. 444,⁹ S. C. But though the loss of the note has not been duly advertised, yet if it has been received under circumstances that induce a belief that the receiver knew that the holder had become possessed of it dishonestly, the true owner is entitled to recover its value from the receiver. The negligence of the owner is no excuse for the dishonesty of the receiver. But the negligence of the one may be an excuse for the negligence of the other, and might authorise him to defend himself on the maxim *potior est conditio possidentis*. Per Best, C. J., *Snow v. Peacock*, 3 Bingh. 406.¹⁰

Evidence of special property.] It is sufficient for the plaintiff to prove that he has a special property in the goods converted. Thus a carrier, a bailee, the sheriff who has taken goods in execution, *B. N. P.* 33, the agister of cattle, *Br. Ab. Tresp.* 67, the lord who seises an estray or wreck before the year and day expired, *B. N. P.* 33, may maintain this action. So if a house be blown down, and a stranger take away the timber, the lessee for life may bring trover, for he has a special property to make use of the same in rebuilding. *Ibid.* In some cases a person who has only a special property may maintain trover, although he has never had actual possession: thus a factor to whom goods have been consigned, but by whom they have never been received, may bring trover for them. Per Eyre, C. J., *Fowler v. Down*, 1 B. and P. 47. And where the consignor of goods, hearing that the consignee had stopped payment, indorsed the bill of lading to the plaintiff, without consideration, directing him to take possession of the goods, and the plaintiff demanded the goods from the defendants (wharfingers), who refused to deliver them, it was held that the plaintiff had such a special property as entitled him to maintain trover. *Morison v.*

⁷ 19 Eng. Com. Law Reps. 201. ⁸ 12 Id. 121. ⁹ 13 Id. 44. ¹⁰ 13 Id. 25.

Gray, 2 Bingham. 280. See *Waring v. Cox, 1 Campbell. 306, Sargent v. Morris, 3 B. and A. 276.*^a Where a person entitled to the temporary possession of a chattel delivers it to the general owner for a special purpose, he may, after that purpose is satisfied, and on the refusal of the general owner to return it, maintain trover against him for the chattel. *Roberts v. Wyatt, 2 Taunt. 268.* It has been held that a landlord who distrains goods has not such a special property as will enable him to maintain trover, for he has only a pledge with a power to sell by statute. *Moneaux v. Goreham, Selw. N. P. 1303, R. v. Cotton, Parker, 112, sed quare.*

Evidence of possession—sufficient against a wrong-doer.] Where the action is brought against a mere wrong-doer, it will be sufficient for the plaintiff to show that he was in possession of the property. Thus where a chimney-sweeper's boy found a jewel, and took it to a jeweller who refused to return it, it was held, that though the finder did not acquire an absolute property, yet he had such a property as would enable him to keep it against all but the rightful owner, and consequently that he might maintain trover. *Armory v. Delamirie, 1 Str. 505.* So where the plaintiff bought a vessel which had been stranded, which was not conveyed to him according to the provisions of the registry acts, and took possession of her, and afterwards she went to pieces, and part of the wreck, drifting upon the defendant's premises, was seized by him, it was held that the plaintiff had a sufficient property to maintain this action. *Sutton v. Buck, 2 Taunt. 302.* So where the owner of furniture lent it to the plaintiff under a written agreement, and the plaintiff placed it in a house occupied by the wife of C. a bankrupt, C.'s assignees having seized the furniture, it was held that the plaintiff might recover in trover without producing the agreement. *Burton v. Hughes, 2 Bingham. 173.*^a Where in trover for copper-ore, it was proved that the plaintiff was in possession of land in which he sunk a shaft and raised the ore in question, and the same witness on cross-examination proved that the ore was taken away by a person who had a shaft in an adjoining close, and who was getting the same load of copper-ore under the plaintiff's land where he sunk his shaft, it was held that this was *prima facie* evidence of the plaintiff's right to the ore. *Rowe v. Brenton, 8 B. and C. 737.*^c

Evidence of right of possession.] The plaintiff must show that he has a right to the immediate possession of the goods, or he cannot recover in this action. Thus the purchaser of goods not sold upon credit, though by the contract of sale he acquires the right of property, has no right of possession until he pays or tenders the

^a 9 Eng. Com. Law Reps. 405. ^b 5 Id. 283. ^c 9 Id. 368. ^d 15 Id. 335.

price. *Bloxam v. Saunders*, 2 B. and C. 941,^s ante, p. 390. So where goods, leased as furniture with a house, have been wrongfully taken in execution by the sheriff, the landlord cannot maintain trover against the sheriff pending the lease, for he has not the right of possession. *Gordon v. Harper*, 7 T. R. 9. *Pain v. Whittaker*, R. and M. 99. But where the furniture was let to a married woman living apart from her husband, it was held, that inasmuch as she could not acquire the right of possession by any contract, the owner of the furniture might maintain trover for it. *Smith v. Plomer*, 15 East, 607. And where certain mill machinery, together with a mill, had been demised for a term to a tenant, who without permission from his landlord, severed the machinery from the mill, and it was afterwards seized and sold by the sheriff under a *fi. fa.*, it was held that no property passed to the vendee, and that the landlord was entitled to bring trover for the machinery, even during the continuance of the term. *Farrant v. Thompson*, 5 B. and A. 826.¹ So where lands are leased for years, and a tree is cut down by a stranger during the term, the landlord may maintain trover for it, for when it is severed the special property of the lessee is determined. *Berry v. Heard*, Cro. Car. 242, *Croke, J. Diss.* 7 T. R. 13, 5 B. and A. 829,¹ supra. But trover cannot be maintained by a tenant in tail expectant on the determination of an estate for life, without impeachment of waste, for timber which grew upon and was severed from the estate, for the tenant for life has a right to the trees the moment they are cut down. *Pyne v. Dor*, 1 T. R. 55. See *Williams v. Williams*, 12 East, 209, *Channon v. Patch*, 5 B. and C. 897.¹ Where a father gave to his son (an infant sixteen years of age) a watch, and certain books and wearing apparel, it was ruled that the right of possession was in the son, and that the father could not maintain trover for them, though perhaps it might have been otherwise in the case of a very young child. *Hunter v. Westbrook*, 2 C. and P. 578.²

Evidence of conversion—direct conversion.] The gist of the action of trover is the wrongful conversion of the plaintiff's goods by the defendant, but a conversion does not, *ex vi termini*, imply a transfer of property to the defendant, but rather a deprivation of property to the plaintiff. *Keyworth v. Hill*, 3 B. and A. 687.¹ A conversion may be proved either by evidence of a direct act of conversion, or by showing a demand of the goods by the plaintiff, and a refusal by the defendant to deliver them. An unlawful taking of goods out of the possession of the owner is itself a conversion. *B. N. P.* 44, 2 Saund. 47, *g* (n). Therefore a bankrupt may maintain trover against his assignees in order to try the validity of the commission, without proving a demand and refusal, for

^s 10 Eng. Com. Law Reps. 477. ¹ 7 Id. 272. ¹ 12 Id. 399.

² 12 Id. 272. ¹ 5 Id. 422.

the taking of the goods by the assignees is a sufficient conversion, and the plaintiff must be deemed to have delivered them on compulsion. *Summersett v. Jarvis*, 3 B. and B. 2.^a So the using a thing without the license of the owner, found or delivered to the party using it, is a conversion. *Mulgrave v. Ogden*, Cro. Eliz. 219, 3 B. and A. 687.^a Thus the wearing of a pearl is a conversion. *Lord Petre v. Heneage*, 12 Mod. 519. So where a person finds a thing, and misuses it, it is a conversion. *Per Cur.* *Mulgrave v. Ogden*, Cro. Eliz. 219. So where a person coming to the possession of land, found there a block of stone belonging to another, and removed it, not to an adjacent place, but to a distance, it was ruled to be a conversion. *Fordsdick v. Collins*, 1 Stark. 173,^a see *Haughton v. Butler*, 4 T. R. 364. So drawing part of the liquor out of a vessel and filling it up with water, is a conversion of all the liquor. *Richardson v. Atkinson*, 1 Str. 576. So a person in the lawful possession of goods may be guilty of a conversion of them by dealing with them contrary to the orders of the owner. Thus where the owner of goods on board a vessel, directed the captain not to land them on a wharf against which the vessel was moored, which he promised to do, but afterwards delivered them to the wharfinger for the owner's use, under an idea that the wharfinger had a lien thereon for the wharfage fees, this was held a conversion. *Syeds v. Hay*, 3 T. R. 260. But where the defendant, who had been entrusted by the plaintiff to sell certain goods in India, not being able to sell them there himself, delivered them to an agent in India to be disposed of by him, it was held no conversion. *Bromley v. Coxwell*, 3 B. and P. 438. In order to constitute an actual conversion, it is not necessary that the party should deal with the goods as his own; thus where a bankrupt being indebted to G. delivered goods to G.'s servant, who gave a receipt for them in G.'s name, and sold them for his use, it was held that this sale was a conversion by the servant. *Perkins v. Smith*, 1 Wils. 328. So the misdelivery of goods by a wharfinger, *Devereaux v. Barclay*, 2 B. and A. 702, or by a carrier, *Youl v. Harbottle*, Peake, 49. *Stephen-son v. Hart*, 4 Bingh. 483,^a is a conversion, though it is otherwise where he loses goods by accident. *Ibid.* *Ross v. Johnson*, 5 Burr. 2625. Proof that the carrier asserted that he had delivered the goods to the consignee, and that such assertion is false, is not evidence of a conversion. *Attersoll v. Briant*, 1 Campb. 409.

The taking the plaintiff's property by assignment from another who has no right to dispose of it is a conversion; therefore where the defendant took an assignment of tobacco in the king's warehouse, by way of pledge from a broker who had purchased it in his own name for his principal, it was held that he had been guilty of a conversion, it being also proved, that when the tobacco was demanded from him by the plaintiff he refused to deliver it.

^a 7 Eng. Com. Law Reps. 322. ^a 5 Id. 422. ^a 2 Id. 343. ^a 15 Id. 47.

McCombie v. Davies, 6 East, 538. *Baldwin v. Cole*, 6 Mod. 212. see also *Jackson v. Anderson*, 4 Taunt. 25. But where goods were placed in the hands of a factor for sale, and he indorsed the bills of lading to the defendants, who thereupon accepted a bill for him, and he at the same time directed the defendants to sell the goods, and reimburse themselves the amount of the bill out of the proceeds, it was held that the defendants, having sold the goods, could not be sued for them in trover by the original owner. *Stierhold v. Holden*, 4 B. and C. 5.* So where a broker who is authorised to sell goods at a certain price, sells them at an inferior price, it is no conversion by him. *Dufrene v. Hutchinson*, 3 Taunt. 117.

Where A. consigned the goods of B. to C., and C. without notice of the right of B. sold a part, and kept the remainder in his possession, the sale was held to be a conversion. *Featherstonhaugh v. Johnson*, 8 Taunt. 237.† And where a banker discounted a bill drawn on a customer, and by the acceptance made payable at his bank, after it had been lost by the holder, of which he had notice, and afterwards debited his customer with the amount of the bill, wrote a discharge on it, and delivered it up to the customer as the banker's voucher of his account, it was held that the banker was guilty of an actual conversion. *Lovell v. Martin*, 4 Taunt. 799; and see *Beckwith v. Corral*, 2 C. and P. 263.‡

Where the defendant took the plaintiff's boat in order to reach his own vessel, which was on fire, being under the plaintiff's care, and the boat was accidentally sunk, Lord Ellenborough was of opinion that this was not a conversion. *Drake v. Shorter*, 4 Esp. 165. So it is no conversion if the master of a ship throw goods into the sea to prevent the ship from sinking. *Bird v. Astcock*, 2 Bulstr. 280.

Evidence of conversion—by demand and refusal.] A demand of the goods by the plaintiff, and a refusal to deliver them by the defendant, he having the power to deliver them, are evidence of a conversion. But being only presumptive evidence of a conversion, it may be rebutted by other evidence to the contrary. 2 Saund. 47 e (n). A demand and refusal are evidence of a prior conversion; *Per Cur. Wilton v. Girdlestone*, 5 B. and A. 847.‡ A distinct refusal must be proved, mere evasive excuses for not delivering the goods will not be sufficient. *Severin v. Keppel*, 4 Esp. 156. But where, in trover by assignees of a bankrupt for a landau, it appeared that after the act of bankruptcy the bankrupt had sold the landau to the defendant, and that a written demand of it had been left by the plaintiff at the defendant's house; but it did not appear that the latter had expressly refused to deliver it up, Richardson, J. ruled that the demand, and the non-delivery in pursuance

* 10 Eng. Com. Law Repts. 260. † 4 Id. 88. ‡ 12 Id. 121. § 7 Id. 278.

of that demand, were evidence of a conversion. *Watkins v. Wolley, Gow*, 69.*

Whenever the circumstances are not such as to amount to an actual conversion, the plaintiff, in order to recover, must prove a demand and refusal. Thus where a trader on the eve of a bankruptcy makes a collusive sale of goods to A. the assignees cannot maintain trover against A. without proof of a demand and refusal. *Nixon v. Jenkins*, 2 H. Bl. 135, see *Perkins v. Smith*, 1 Wils. 238, ante, p. 327. *Jones v. Fort*, 9 B. and C. 764.† *Tennant v. Strachan*, 1 M. and M. 377.

In order to render a demand and refusal evidence of a conversion, it must appear, that at the time of the demand made the party had it in his power to deliver up or retain the article demanded. *Smith v. Young*, 1 Campb. 441.

There are many cases in which a refusal to deliver goods will not be evidence of a conversion. Thus where the party detaining them refuses to deliver on the ground of having a present right to the possession, as where a carrier or wharfinger detains goods as a lieu for his carriage or wharfage. *Skinner v. Upshaw*, 2 Lord Raym. 752, *York v. Grenough*, Id. 866. But where a person who has a lien, on demand made, does not claim to retain the goods in right of his lien, but as his own property, it will be evidence of having waived his lien. *Boardman v. Sill*, 1 Campb. 410 (n). Thus where the vender of goods in order to stop them in transitu, applied to the captain to deliver them up, but did not tender the freight, and the captain refused, alleging that he had signed a bill of lading to deliver the goods to another, it was held that he had dispensed with any tender of the freight, and that the demand and refusal were presumptive evidence of a conversion. *Thompson v. Trail*, 6 B. and C. 36,‡ 9 D. and R. 31, S. C. Yet when the defendant, who had a lien on some cloth, purchased it from the bailor after he had become bankrupt, and when the cloth was demanded of him by the assignees, refused to give it up, saying, "I may as well give up every transaction of my life," it was held that these words were no waiver of his lien, and that the lien was not merged in the purchase. *White v. Gainer*, 2 Bingh. 23.⁴ So if a person who finds goods refuses to deliver them to the owner until he proves his right to them, such refusal is no evidence of a conversion. *Green v. Dunn*, 3 Campb. 215, (n), *Solomon v. Dawes*, 1 Esp. 83, *Gunton v. Nurse*, 2 B. and B. 449.⁵ 2 B. and P. 464. So where goods, the property of the plaintiff, had been, by the servants of an insurance company, carried to a warehouse, of which the defendant, a servant of the company, kept the key, and the defendant, on being applied to by the plaintiff to deliver them up, refused to do so without an order from the company, it was held that this refusal was no evidence of a conversion. *Alexander v. Southey*, 5 B. and A. 247.⁶ A refusal by the general agent of a party is not evi-

* 5 Eng. Com. Law Reps. 467. † 17 Id. 493. ‡ 13 Id. 103. § 9 Id. 302.
⁴ 6 Id. 193. ⁵ 7 Id. 85.

dence of a conversion by that party; it must be shown that, in the particular fact of the refusal, the agent acted under the special directions of his principal, *Per Gibbs, C. J., Pothier v. Dawson, Holt*, 383.^a But proof of a refusal by the servant of a pawnbroker has been held to be evidence of a conversion by his master. *Janes v. Hart*, 2 Salk. 441. In trover for bricks, where the evidence to prove the conversion was, that some men fetched away the bricks in a cart, on which the defendant's name was painted, and that the men, on being asked why they did so, said they were ordered by their master, Mr. W. (the name of the defendant,) Lord Gifford ruled that there was no evidence to connect the defendant with the transaction. *Everest v. Wood*, 1 C. and P. 75.^b

A demand of payment for the goods has been held a sufficient demand, *Thompson v. Shirley*, 1 Esp. 31; and service of a written demand, by leaving it at the house of the defendant, is good. *Logan v. Houlditch*, 1 Esp. 22. Where two independent concurrent demands have been made, one verbal and the other in writing, proof of either will be sufficient. *Smith v. Young*, 1 Campb. 440. A demand and refusal of fixtures is no evidence of the conversion of articles which are not fixtures. *Colegrave v. Dias Santos*, 2 B. and C. 76.^c

Evidence of conversion, by whom.] As the possession of one jointenant, tenant in common, or parcener, is the possession of the other or others, trover cannot in general be maintained by one jointenant, &c. against his companion. *Co. Litt.* 200, a, 2. *Saund.* 47, h (n). Thus where the plaintiff and one of the defendants were members of a friendly society, the funds of which were kept in a box deposited with them, and the defendant took away the box and delivered it to the other defendant, who was not a member of the society, it was held that the plaintiff could not maintain trover for the box. *Holliday v. Camsell*, 1 T. R. 658. So where one tenant in common of a whale refused to deliver a moiety of it to the other, and put it up and expressed the oil, it was held that this was no conversion. *Fennings v. Lord Grenville*, 1 Taunt. 241. But if one tenant in common, &c. destroy the thing in common, trover lies. Thus where one tenant in common of a ship took it away by force and sent it to the West Indies, where it was lost in a storm, it was held to be evidence of a destruction by him so as to support an action of trover. *Barnardston v. Chapman*, cited 4 East, 121, B. N. P. 34. So it is said that the sale of the whole of a chattel by one tenant in common, without authority of his cotenant, either express or implied, is with respect to the other a wrongful conversion of his undivided part. *Per Bayley, J., Barton v. Williams*, 5 B. and A. 403.^d See *Heath v. Hubbard*, 4 East, 110, 126.

^a 3 Eng. Com. Law Reps. 135. ^b 11 Id. 320. ^c 9 Id. 30. ^d 7 Id. 148.

The action may be brought against any person who was a party to the conversion, although the goods were actually converted by another. 2 *Saund.* 47, *m* (n). Thus if a person sue out an execution against a bankrupt, and the sheriff seize the goods and sell them, and give the money to the person suing out the execution, the assignees may bring trover against the sheriff, or against the party suing out the execution, if he can be proved a party to the conversion, by giving bond to secure the sheriff, and so making it his own act. *Rush v. Baker*, B. N. P. 41. And the law seems to be the same, though A. should not give the bond, if he receives the money. S. C. 2 *Str.* 996, 2 *Saund.* 47, *m* (n); see *Nicoll v. Glennie*, 9 *M. and S.* 592. So where a bankrupt left some plate with his wife, who delivered it to a servant to sell, and the servant delivered it at the door of W.'s shop to the defendant, who went into the shop and pawned it in his own name, and immediately delivered the money to the servant, who paid it to the wife, it was held to be a conversion by the defendant. *Parker v. Godin*, 2 *Str.* 813, B. N. P. 47.

Trover will lie against a corporation, and it seems not to be necessary to show that the conversion was authorised by an instrument under seal. *Yarborough v. Bank of England*, 16 *East*, 6. *Duncan v. Proprietors of Surrey Canal*, 3 *Stark.* 50.*

A servant is liable in an action of trover for a conversion, though for his master's benefit. *Stephens v. Elwall*, 4 *M. and S.* 259, 5 *B. and A.* 249.†

In an action against several, a joint act of conversion must be proved in order to obtain a verdict against all. *Nicoll v. Glennie*, 1 *M. and S.* 588.

Defence.

The defendant may prove under the general issue that the right of property and possession in the goods is in himself, or in some person under whom he claims; so he may show that he has a right to the possession, which will be a sufficient answer in this action. See *Laclough v. Towle*, 3 *Esp.* 114. But it will be no defence merely to show that the plaintiff has not the right of property; for if the defendant is a wrong-doer, possession alone is sufficient to entitle the plaintiff to maintain trover against him.

Trover will not lie for goods regularly sold under a distress, the stat. 11 Geo. II. c. 19, s. 19, giving an action on the case, *Wallace v. King*, 1 *H. Bl.* 13; but for goods taken under a wrongful distress trover will lie. *Shipwick v. Blanchard*, 6 *T. R.* 298.

The defendant may show facts amounting to a license. Thus if a person against whom a commission of bankrupt has issued, acquiesces in it so far as to take a part in the sale of his own effects

* 14 Eng. Com. Law Reps. 159. † 7 Id. 86.

by recommending an auctioneer to conduct the sale, such sale is not a conversion. *Clarke v. Clarke*, 6 *Esp.* 61.

Evidence of general lien.] That the defendant has a lien, either general or special, on the goods, and therefore a right in the possession of them until his claim is satisfied, is a usual defence in this action. A general lien may be proved either by evidence of an express agreement, or of the mode of dealing between the parties, or of the general dealings of other persons engaged in the same employment, of such notoriety as that they may fairly be presumed to be known to the owner of the goods. *Rushworth v. Hadfield*, 7 *East*, 228. *Green v. Farmer*, 4 *Burr.* 2220. To establish a general lien by evidence of the general usage, the instances ought to be ancient, numerous, and important. *Ibid*; and see 6 *East*, 526, *Holderness v. Collinson*, 7 *B. and C.* 214,^s *Bleadon v. Hancock*, 4 *C. and P.* 156.^a Where a number of tradesmen come to an agreement not to receive the goods of any person who will not consent that the goods shall be retained for a general balance, and a party having notice of such agreement, sends his goods, he will be bound by it. *Kirkman v. Shawcross*, 6 *T. R.* 14. So if a carrier give notice that all goods shall be considered subject to a lien, not only for the freight of the particular goods, but also for any general balance due from the respective owners, perhaps as between the real owner of the goods and the carrier, that may be a binding bargain. *Per Bayley, J., Wright v. Snell*, 5 *B. and A.* 353;ⁱ see 3 *B. and P.* 48; but in such case he has not, as against the real owner, any lien for the balance due to him from the party to whom the goods are addressed, the mere factor of the owner. *Ibid*. So a usage for carriers to retain goods as a lien for a general balance of accounts between them and the consignees, cannot affect the right of the consignor to stop the goods *in transitu*. *Oppenheim v. Russell*, 3 *B. and P.* 42. So also a carrier who, by the usage of a particular trade, is to be paid for the carriage of goods by the consignor, has no right to retain them against the consignee for a general balance due to him for the carriage of other goods of the same sort sent by the consignor. *Butler v. Woolcot*, 2 *N. R.* 64. The lien of wharfingers for their general balance has been proved so often that it is to be considered as a settled point. *Per Ld. Kenyon, Vaylor v. Mangies*, 1 *Esp.* 110. *Spears v. Hartley*, 3 *Esp.* 81.

A banker has a lien for his general balance upon the securities of his customers in his hands. *Jourdain v. Lefevre*, 1 *Esp.* 66. *Boland v. Bygrave, R. and M.* 171. So calico-printers. *Weldon v. Gould*, 3 *Esp.* 268. A printer employed to print certain numbers, but not all consecutive numbers of an entire work, has a lien upon the copies not delivered, for his general balance for the whole of those numbers. *Blake v. Nicholson*, 3 *M. and S.* 167. With regard

^s 14 *Eng. Com. Law Reps.* 30. ^a 19 *Id.* 317. ⁱ 7 *Id.* 128.

to dyers a lien for their general balance has been established in several cases; *Savill v. Barchard*, 4 *Esp.* 53, *Humphreys v. Partridge*, *Montagu Bank Law*, 18 (n), admitted, *Arg.* 6 *East*, 523, *Rose v. Hart*, 8 *Taunt.* 490;^{*} but in other cases in which such a lien has been claimed, the evidence was insufficient to establish it. *Green v. Farmer*, 4 *Burr.* 2214. *Close v. Waterhouse*, 6 *East*, 523 (n). *Bennett v. Johnson*, 2 *Chitty*, 455.¹ Attornies have a lien for their general balance, on papers of their clients which come to their hands in the course of their business. *Stevenson v. Blakelock*, 1 *M. and S.* 535. Insurance brokers have a lien for their general balance, even against agents who do not disclose their principals, *Mann v. Forrester*, 4 *Campb.* 60; but not where they have notice that the party who employs them is merely an agent. *Maans v. Henderson*, 1 *East*, 335. Factors have a general lien. *Kruger v. Wilcox*, *Ambler*, 252, 6 *T. R.* 262. And so packers, who are in the nature of factors. *Green v. Farmer*, 4 *Burr.* 2222, 4 *Esp.* 55.

Evidence of particular lien.] In general where a person bestows his labour upon a particular chattel delivered to him in the course of his business, he has a lien upon such chattel for the amount of his charge. Thus a miller has a lien on the corn ground by him. *Ex parte Ockenden*, 1 *Atk.* 235, 5 *M. and S.* 180. A shipwright upon a ship for repairs, *Franklin v. Hosier*, 4 *B. and A.* 341;² a tailor on the cloth delivered to and made up by him. *Hussey v. Christie*, 9 *East*, 483, 3 *M. and S.* 169. So an inn-keeper, or keeper of a house of public entertainment, as a tavern or coffee-house. *Thompson v. Lacy*, 3 *B. and A.* 283.³ So a master of a vessel upon the luggage of his passengers for passage-money. *Wolf v. Summers*, 2 *Campb.* 631. Where goods are delivered in separate quantities at different times, yet if the work be done under one entire agreement, the right of lien for the work expended upon the whole, attaches upon every part. *Chase v. Westmore*, 5 *M. and S.* 180. A livery-stable-keeper has not a lien upon the horses in his stable for their keep, without an express agreement; *York v. Greenough*, 2 *Ld. Raym.* 866. *Wallace v. Woodgate*, *R. and M.* 194; though it is otherwise of an innkeeper. *Johnson v. Hill*, 3 *Stark.* 172.⁴ And a trainer has a lien for his charge in keeping and training a horse. *Bevan v. Waters*, 1 *M. and M.* 236.

The vendor of goods not sold upon credit, has a lien for the price; but where the goods are sold upon a credit, such a lien does not arise, *post*, p. 401. And where the purchaser of goods upon which the seller has a lien obtains possession of them by fraud, the seller has still a right to the possession, and may maintain trover for the goods. *Haase v. Crowe*, *R. and M.* 414.

^{*} 4 *Eng. Com. Law Reps.* 185. ¹ 18 *Id.* 395.

² 6 *Id.* 446. ³ 5 *Id.* 285. ⁴ 14 *Id.* 176.

Evidence of lien, 6 Geo. IV. c. 94, s. 5.] It is enacted by this statute, that "it shall be lawful to and for any person or persons, body or bodies politic or corporate, to accept and take any such goods, wares, and merchandize, or any such document as aforesaid, in deposit or pledge from any such factor or factors, agent or agents, notwithstanding such person or persons, body or bodies politic or corporate, shall have such notice as aforesaid, that the person or persons making such deposit or pledge is or are a factor or factors, agent or agents; but then and in that case each person or persons, body or bodies politic or corporate, shall acquire no further or other right, title, or interest in, or upon, or to the said goods, wares, or merchandize, or any such document as aforesaid for the delivery thereof, than was possessed, or could or might have been enforced by the said factor or factors, agent or agents, at the time of such deposit or pledge, as a security as last aforesaid; but such person or persons, body or bodies politic or corporate, shall and may acquire, possess, and enforce such right, title, or interest, as was possessed and might have been enforced by such factor or factors, agent or agents, at the time of such deposit or pledge as aforesaid."

It has been held under this statute, that where a broker accepts bills for his principal on the security of goods then in his hands, and pledges the goods with a person who has no notice of the agency, and does not inform the principal of the transaction, the broker only transfers such right as he has, which is a right to be indemnified against the bills accepted; and that the principal having satisfied those bills, has a right to have his goods back from the pawnee without paying the amount for which they were pledged. *Fletcher v. Heath*, 7 B. and C. 517.* In order to bring a case within this section of the statute, the transfer must have been made expressly as a pledge. *Thompson v. Farmer*, 1 M. and M. 48.

Evidence of lien—cases in which a lien does not arise.] It was formerly thought that a lien did not arise where there is an express contract between the parties relative to the price, &c.; but only in cases of implied contract; but it is now settled that a special agreement does not of itself destroy the right to retain, but only when it contains some term inconsistent with that right. Thus where corn is delivered to a miller to be ground at a certain stipulated sum per load, the miller has a lien for that sum. *Chase v. Westmore*, 5 M. and S. 180. But if by the agreement the purchaser of goods is entitled to have the goods immediately, and the payment in respect of them is to take place at a future time, that is inconsistent with the right to retain the goods till payment, and the seller will have no lien for the price of the goods. *Crawshaw v. Homfray*, 4 B. and A. 52,^a *supra*. Thus where wharfage

* 14 Eng. Com. Law Reps. 94. † 6 Id. 345.

due upon goods is by the course of trade payable at Christmas, whether the goods are in the mean time removed or not, there arises no lien on the goods for the wharfage. *Id.* 4 B. and A. 50.

In general a lien cannot arise unless the party claiming it has possession of the goods. *Kinlock v. Craig*, 3 T. R. 119, 783, *Taylor v. Robinson*, 8 Taunt. 648.* And where a party obtains the possession of goods by misrepresentation he cannot claim a lien upon them, though had they come rightfully to his hands, he might have been entitled to retain them. *Madden v. Kempster*, 1 Campb. 12, and see *Lempriere v. Pasley*, 2 T. R. 485.

In order to establish a lien it must appear that the work, &c. in respect of which it was claimed, was done at the request of the owner of the goods detained, and therefore where a servant took his master's chaise, which had been broken by his negligence, to a coach-maker to be repaired, without his master's knowledge, it was ruled that the coach-maker had no right to retain the chaise against the master, for the repairs. *Hiscox v. Greenwood*, 4 Esp. 174.

Evidence of lien—when waived.] A party entitled to a lien may waive it by not insisting upon it when the goods are demanded from him. *Boardman v. Sill*, 1 Campb. 310 (n). So he may waive it by parting with the possession, as where the goods are taken in execution at his own suit. *Jacobs v. Latour*, 5 Bingh. 130.† Thus where a coach-maker repaired a carriage, and allowed the owner to take it away, it was ruled that he could not retain it for the repairs, when again brought to him. *Hartley v. Hinchcock*, 1 Stark. 408,‡ and see *Jones v. Pearle*, 1 Str. 557. So where a bailee of goods who had a lien, delivered them to a carrier on account of the bailor, and afterwards stopped the goods *in transitu*, and got possession of them again, it was held that the lien did not revive, *Sweet v. Pym*, 1 East, 4; but it has been held that the lien of an insurance-broker (who has a general lien), revives on repossession of the policy. *Whitehead v. Vaughan, Co. Bank. Law*, 547, 7th ed. *Levy v. Barnard*, 8 Taunt. 149.¶ And where horses, on which a livery and stable-keeper had by agreement a lien, were fraudulently taken out of his possession by the owner, it was ruled that the livery stable-keeper, having without force, retaken the horses, his lien revived. *Wallace v. Woodgate*, 1 R. and M. 193. Where the owner of a ship, having a lien on the goods, until the delivery of good and approved bills for the freight, took a bill of exchange in payment, and though he objected to it at the time, afterwards negotiated it, it was held that such negotiation amounted to an approval of the bill by him, and that his lien on the goods was waived. *Horncastle v. Farran*, 3 B. and A. 497.⋄ See *Stevenson v. Blake*

* 14 Eng. Com. Law Reps. 410. † 4 Id. 238. ‡ 15 Id. 388. § 2 Id. 447.

¶ 4 Id. 52. ⋄ 5 Id. 356.

lock, 1 *M. and S.* 535. Where the seller of goods recovered a verdict for goods bargained and sold, it was ruled by Lord Ellenborough, that he had not thereby waived his lien, though it might have been otherwise had he recovered a verdict for goods sold and delivered. *Houlditch v. Desange*, 2 *Stark.* 337.² A lien is not destroyed though the demand in respect of which it arises is barred by the statute of limitations. *Spears v. Hartley*, 4 *Esp.* 81.

Where goods, upon which the captain of a ship has a lien, are deposited in the king's warehouse in pursuance of the requisitions of an act of parliament, the lien is not thereby waived. *Per Lord Kenyon, C. J., Ward v. Felton*, 1 *East*, 512; and see *Wilson v. Kymer*, 1 *M. and S.* 167.

Evidence in mitigation of Damages.] Although the defendant cannot under the general issue object that another part owner of the goods has not been joined as plaintiff, so as to defeat the action, see *Blaxam v. Hubbard*, 5 *East*, 420; yet he may give that fact in evidence in order to reduce the plaintiff's damages to the amount of his own share. *Nelthorpe v. Darrington*, 2 *Lev.* 113. In an action by a rightful executor against an executor *de son tort*, the latter may prove in mitigation of damages, that he has paid debts of the deceased. *Whitehill v. Squire*, *Carth.* 104. But where the defendant, who was appointed executor by a prior will, proved it, and after notice of a later will sold certain goods of the testator, it was held that the plaintiff, who was executor under the later will (the probate of the former being revoked), might recover the whole value of the goods so sold, and that the defendant could not give evidence of the due administration of the assets by himself. *Woolley v. Clark*, 5 *B. and A.* 744,² *sed quære*. And it is said, that if the payments made by the executor *de son tort*, amount to the full value of the sum to be recovered in the action of trover, the plaintiff shall be nonsuited, *B. N. P.* 48; but the authority cited for this position does not support it, and it is, as it seems, incorrect. *Mountford v. Gibson*, 4 *East*, 447, 2 *Phill. Ev.* 175.

Though a conversion cannot be purged, yet the defendant may show, in mitigation of damages, that he has returned the goods. *Countess of Rutland's case*, 1 *Roll. Ab.* 5.

² 3 Eng. Com. Law Reps. 373. ² 7 Id. 249.

EVIDENCE IN ACTIONS BY AND AGAINST PARTICULAR PERSONS.

ACTIONS BY ASSIGNEES OF BANKRUPTS.

In an action by the assignees of a bankrupt, the plaintiffs must prove, 1. The bankruptcy, and the plaintiffs' title to sue an assignee, except in certain cases, in which such evidence is dispensed with. 2. The cause of action in the usual manner.

Evidence of the bankruptcy under 6 Geo. IV. c. 16, s. 90 and 92.] By 6 Geo. IV. c. 16, s. 92, if the bankrupt shall not (if he was within the United Kingdom at the issuing of the commission) within two calendar months after the adjudication, or (if he was out of the United Kingdom), within twelve calendar months after the adjudication, have given notice of his intention to dispute the commission, and have proceeded therein with due diligence, the depositions taken before the commissioners, at the time of, or previous to the adjudication, of the petitioning creditor's debt or debts, and of the trading, and act or acts of bankruptcy, shall be conclusive evidence of the matters therein respectively contained, in all actions at law, or suits in equity, brought by the assignees for any debt, or demand, *for which the bankrupt might have sustained any action or suit.* Where there are some counts on causes of action on which the bankrupt might have sued, and others on which he could not, the proceedings under the commission are evidence, if the plaintiffs elect to proceed only on those counts which the bankrupt might have sustained. *Jones v. Fort*, 1 M. and M. 196. The above section does not apply to commissions anterior to the act. *Kay v. Goodwin*, 6 Bingham 576.*

By the term *conclusive evidence* in this section, must be understood that no evidence is to be admitted to contradict the depositions, the construction at first put upon Sir S. Romilly's act. *Eden*, 870. Before the late statute, it was held that the depositions were not conclusive, where on the face of them there did not appear to be a sufficient petitioning creditor's debt, &c. *Brown v. Forrestall*, Holt, 190,* *Cooper v. Machin*, 1 Bingham 426;* but under the above section it has been decided, that where no notice has been given to dispute a commission, and the proceedings and commission are put in, and there does not appear to be a sufficient petitioning creditor's debt, though there is nothing to disprove such a debt, the

* 19 Eng. Com. Law Reps. 169. *3 Id. 69. *6 Id. 387.

commission cannot be disputed. *Macbeath v. Coates*, 4 Bingh. 34.* Where the petitioning creditor's debt is proved by the deposition, it is not competent for the defendant to prove that the debt was a fraudulent contrivance between the bankrupt and the petitioning creditor. *Young v. Timmins*, 1 Crom. and Jerv. 148. To make the proceedings evidence it must be shown that they came out of the custody of the solicitor to the commission, or the handwriting of the commissioners must be proved. *Collinson v. Hillear*, 3 Camp. 30; for which purpose the bankrupt himself, having obtained his certificate and released the surplus, is a competent witness. *Morgan v. Pryer*, 2 B. and C. 14.⁴ As to producing the proceedings, *vide ante*, p. 64. It is only on actions or suits brought by the bankrupt's own assignees for a debt or demand for which *he* might have sued, that the depositions are made evidence, and therefore if the assignees of another bankrupt are petitioning creditors, and notice of disputing the petitioning creditor's debt is given, the depositions under the latter commission are not evidence by this section. *Muskett v. Drummond*, 10 B. and C. 153. See *Scaife v. Howard*, 2 B. and C. 560; ⁵ *post*, p. 417.

By 6 Geo. IV. c. 16, s. 90, it is enacted that in any action by, or against, any assignee, or in any action against any commissioner, or person acting under the warrant of the commissioners, for any thing done as such commissioner, or under such warrant, no proof shall be required at the trial, of the petitioning creditor's debt or debts, or of the trading, or act or acts of bankruptcy, respectively, unless the other party in such action shall, if defendant, at or before pleading, and if plaintiff, before issue joined, give notice in writing to such assignee, commissioner, or other person, that he intends to dispute some, and which of such matters, and in case such notice shall have been given, the judge may certify that the matter has been proved or admitted, which shall entitle the party to costs. Notice to dispute "the bankruptcy" is too general. It must specify which of the three matters, trading, petitioning creditor's debt, and act of bankruptcy, is intended to be disputed. *Trinley v. Unwin*, 6 B. and C. 537.⁵

Under this section no proof whatever of the petitioning creditor's debt, trading, or act of bankruptcy, is required, unless proper notice has been given. Where the bankrupt was within the United Kingdom at the time of the issuing of the commission, and has given no notice to dispute the commission, the effect of the above clause is, that in cases where the bankrupt, if solvent, could have sued, and the defendant gives notice of his intention to dispute the bankruptcy, &c. the fact so disputed must be proved, but the depositions under the commission are conclusive evidence of the matters contained in them. *Earlth v. Schroder*, 1 M. and M. 26. *Eden*, 370.

Where notice has been given only to dispute the act of bank-

* 18 Eng. Com. Law Reps. 330. ⁴ 9 Id. 8. ⁵ 9 Id. 178. ⁶ 13 Id. 248.

ruptcy, and the other side have read the depositions on the file to prove the trading and debt, the residue of the proceedings are not considered to be in evidence, and the counsel of the party contesting the commission has no right to inspect them. *Black v. Thorpe*, 4 *Campb.* 191, *Stafford v. Clarke*, 1 *C. and P.* 26. The notice is not part of the defendant's evidence in the cause, but may be proved at the commencement of the plaintiff's case, and will immediately put him upon strict proof. *Decharmy v. Lane*, 2 *Campb.* 323.

Evidence of bankruptcy under 6 Geo. IV. c. 16, s. 90, 92—service of notice.] A notice served by delivering it to the clerk at the defendant's counting-house, before issue joined, without showing that it has come to the defendant's hands, has been held rightly served. *Wedger v. Browning*, 1 *M. and M.* 27, 2 *C. and P.* 523,* *S. C.* If no notice has been delivered with the plea, and the plea is got back, under a false pretence, and redelivered with a notice, it seems to be insufficient. *Lawrence v. Crowder*, 1 *M. and P.* 511, 3 *C. and P.* 229,* *S. C.* See also *Folks v. Scudder*, 3 *C. and P.* 232.¹ Service on the attorney is sufficient. *Howard v. Ramsbottom*, 3 *Taunt.* 526.

Strict proof of title.] Strict proof of the title of the assignees has been dispensed with in cases where the defendant's conduct has been an express or implied admission of their title. *Eden*, 354, see *Malby v. Christie*, 1 *Esp.* 340, *Watson v. Wace*, 5 *B. and C.* 153;* *Rankin v. Horner*, 16 *East*, 191, stated ante, p. 27. Thus where the defendant had attended a meeting of the commissioners, and exhibited an account between him and the bankrupt, and afterwards made a part payment to the assignee on that account, it was held to be *prima facie* evidence that the plaintiff was assignee. *Dickenson v. Coward*, 1 *B. and A.* 677. So where the defendant on being applied to by the assignee, said he would call and pay the money, this was held to dispense with the usual proofs of the assignee's title. *Pope v. Monk*, 2 *C. and P.* 112.¹ And an affidavit that a party is indebted to the deponent in the sum of 100*l.* and upwards and is become bankrupt, is, as against the deponent, conclusive evidence of the bankruptcy. *Ledbetter v. Salt*, 4 *Bingh.* = 1 *M. and P.* 597, *S. C.*, and see *supra*.

Where the assignees are strangers to the record, and their title comes in accidentally, it must be strictly proved in the regular manner. *Doe v. Liston*, 4 *Taunt.* 741. But, if parties to the record, though not named assignees, the proceedings will be sufficient evidence, unless notice has been given, if the other party is aware that they make title under the commission. *Simmonds v. Knight*, 3 *Campb.* 251, *Rowe v. Lant, Gov.* 24.* *Newport v. Hollings*, 3 *C. and P.* 223.* So, though there are other defendants on the record,

* 12 Eng. Com. Law Reps. 245. * 14 Id. 281. * 14 Id. 281. * 11 Id. 187.

¹ 12 Id. 50. * 15 Id. 91. * 5 Id. 446. * 14 Id. 279.

if these defendants have justified as servants of the assignees. *Gilman v. Cousins*, 2 Stark. 182.*

Strict proof of title, what constitutes.] Strict proof of the plaintiffs' title as assignees requires evidence, 1. Of the petitioning creditor's debt. 2. Of the trading. 3. Of the act of bankruptcy. 4. Of the commission, and 5. Of the assignment.

Evidence of petitioning creditor's debt, nature of, and when accrued.] The petitioning creditor's debt must be proved in the same manner as in an action against the bankrupt himself, *Per Buller, J., Abbott v. Plumbé, Dougl.* 217; and, therefore, where the debt arises on a bond, an acknowledgment of the debt by the obligor will not supersede the necessity of calling the attesting witness. *Abbott v. Plumbé, Dougl.* 216. It must appear that the debt was contracted at the time of the act of bankruptcy. *Clarke v. Askew*, 1 Stark. 458 (n). So where the petitioning creditor's debt arises on a promissory note, dated before the bankruptcy, the note must be proved to have existed prior to the act of bankruptcy, for the date is not even *prima facie* evidence of that fact, 2 Stark. Ex. 161, where it is said that the contrary was held in *Taylor v. Kinloch*, 1 Stark. 175,* upon a mistaken report of a case cited from memory. See 2 Stark. 594.* But where a note was proved to be in existence before the docket was struck, and it bore date on the face of it before the act of bankruptcy, this evidence was considered as *prima facie* proof that the note was in existence before the act of bankruptcy. *Obbard v. Bletham*, 1 M. and M. MSS. So if it can be shown that about the date of the bills goods were sold of corresponding amount. *Cowie v. Harris*, 1 M. and M. 141. So where the petitioning creditor is the indorsee of a bill, the indorsement must be proved to have been made before the commission issued, and the date of the bill affords no presumption as to the time of the indorsement. *Rose v. Rowcroft*, 4 Campb. 245. If the debt be proved to have existed before the act of bankruptcy, its continued existence up to the act will be presumed. *Jackson v. Irwin*, 2 Campb. 50. Unless there have been intermediate transactions. *Gresly v. Price*, 2 C. and P. 48.*

It must appear that the debt was contracted while the party was a trader, or if contracted before, was *subsisting* while he was a trader. *Meggott v. Mills*, 1 Ld. Raym. 287, *Heanny v. Birch*, 3 Campb. 234, *Butcher v. Easto, Dougl.* 295.

If there was a petitioning creditor's debt at the time of the act of bankruptcy, on which a commission might have issued, and there was a petitioning creditor's debt still existing at the time of the commission, it does not signify what happened in the interim, as to the payment of the first debt, the balance throughout

* 3 Eng. Com. Law Reps. 305. * 2 Id. 344. * 3 Id. 490. * 12 Id. 22.

continuing sufficient for a petitioning creditor's debt. *Shaw v. Harvey*, 1 *M. and S. MSS.*

Taking a security of a higher nature, after the act of bankruptcy, for a debt of an inferior nature, contracted before, will not prevent the original debt being a good petitioning creditor's debt. *Ambrose v. Clendon*, 2 *Str.* 1042. Nor will the fact that the debtor has become insolvent, and included the debt in his schedule. *Jellis v. Mountford*, 4 *B. and A.* 258.¹ See *Ex parte Shuttleworth*, 2 *Glynn and J.* 68. And a debt upon an attorney's bill, not signed and delivered according to the statute, is sufficient. *Ex parte Sutton*, 11 *Ves.* 163, *Ex parte Howell*, 1 *Rose*, 312. But a verdict for damages in an action for breach of promise of marriage does not, before judgment, constitute a debt, *Ex parte Charles*, 14 *East*, 197; and where the debtor is taken in execution, there is no good debt to support a commission. *Cohen v. Cunningham*, 8 *T. R.* 123. Though it has been held in several cases that a debt barred by the statute of limitations is sufficient to support a commission, unless, perhaps, where the objection is taken by the bankrupt himself, *Swayne v. Wallenger*, 2 *Str.* 746, *Quantock v. England*, 5 *Burr.* 2628, *Fowler v. Browne*, Co. B. L. 18, and see *Mavor v. Pyne*, 3 *Bingh.* 285,² 2 *C. and P.* 91,³ *S. C.*, yet the proof of such a debt has been disallowed. *Ex parte Dewdney*, *Ex parte Seaman*, 15 *Ves.* 498, *Ex parte Rofsey*, 19 *Ves.* 468, 2 *Rose*, 245, and see *Gregory v. Hurrill*, 5 *B. and C.* 341.⁴

Where there is only one petitioning creditor there must be a debt due to him separately, for which he alone might maintain an action at law, and therefore a commission cannot be supported on the petition of one of two partners, to whom a joint debt is due. *Buckland v. Newsame*, 1 *Taunt.* 477.

Where the petitioning creditor is assignee of another bankrupt, and the debt is due to him in that character, and his title comes incidentally in question, strict evidence of his title as assignee must be given, *Doe v. Liston*, 4 *Taunt.* 741; but, where in an action by an assignee no notice has been given under the statute to dispute the commission, the depositions under the commission are evidence of a debt due to the party, in the character in which he claims it, and no other evidence of the first bankruptcy will in such case be necessary. *Scaife v. Howard*, 2 *B. and C.* 560.⁵ See *Muskett v. Drummond*, 10 *B. and C.* 153, *ante*, p. 414.

Evidence of petitioning creditor's debt, amount of.] The debt of the petitioning creditor must amount, if it is to one creditor, or one firm, to 100*l.*, if it is to two, to 150*l.*, if to more, to 200*l.*, 6 *Geo. IV. c. 16, s. 15*, 100*l.* in notes, bought at 10*s.* a piece, is a sufficient debt. *Ex parte Lee*, 1 *P. Wms.* 782. Where a creditor to the amount of 112*l.*, after notice of an act of bankruptcy, received 50*l.*, it was

¹ 6 *Eng. Com. Law Reps.* 480. ² 11 *Id.* 104. ³ 12 *Id.* 41. ⁴ 11 *Id.* 251.

⁵ 9 *Id.* 178.

held, that as that payment was void, there was still a good petitioning creditor's debt. *Mann v. Shepherd*, 6 T. R. 79.

Evidence of petitioning creditor's debt—admission of bankrupt.] The admissions of the bankrupt himself are frequently given in evidence to establish the petitioning creditor's debt. Thus an entry in the bankrupt's books, *Watts v. Thorpe*, 1 Campb. 376, or an account signed by him charging himself, *Hoare v. Coryton*, 4 Taunt. 560, is sufficient evidence of the debt, provided it be shown that the entry, or account, was made before the act of bankruptcy. An admission, by the bankrupt, of the debt, made *after* the act of bankruptcy, but before the issuing of the commission, has been decided to be inadmissible. *Smallcombe v. Bruges*, *McClell.* 48, 13 Price, 136, S. C., *Saunderson v. Laforest*, 1 C. and P. 46.⁷ But where the debt was founded on a bill of exchange, of which the bankrupt was drawer, it was held that the bankrupt's declaration made after the act of bankruptcy, and before the commission, that the bill would not be paid, was admissible evidence to supply the proof of notice. *Brett v. Levett*, 13 East, 213, see *McClell.* 60, see also *Robson v. Kemp*, 4 Esp. 234, *Douton v. Cross*, 1 Esp. 168.

Evidence of petitioning creditor's debt—bills of exchange, and debts due on credit.] As a bill of exchange is a debt from the date of it, as against the drawer, it is sufficient to constitute a good petitioning creditor's debt, though not indorsed to the creditor till after an act of bankruptcy, *Macarty v. Barrow*, 2 Str. 949, *Glaister v. Hewer*, 7 T. R. 498, *Anon.* 2 Wils. 135, *Eden*, 47; but if the creditor be indorsee, it must appear that the bill was indorsed to him before the commission issued. *Rose v. Rawcroft*, 4 Campb. 245. By 6 Geo. IV. c. 16, s. 15, every person who has given credit to any trader, upon valuable consideration, for any sum payable at a certain time, which time shall not have arrived when such trader committed an act of bankruptcy, may petition, or join in petitioning, whether he shall have any security in writing, or otherwise, for such sum, or not. Where A. having drawn a bill for 148*l.* in favour of B., to whom he was previously indebted in that amount, committed an act of bankruptcy before either the bill was due or had been presented for acceptance, it was held that such bill of exchange was a good petitioning creditor's debt, though subsequently to the commission it had been duly presented to and paid by the acceptors. *Ex parte Douthat*, 4 B. and A. 67.⁸ Where the debt was an acceptance of the bankrupt, and the assignees had had notice to prove the consideration, it was held, that though they were not bound to prove the consideration until impeached, yet that not having adduced any evidence, and the jury, from circumstances of

⁷ 11 Eng. Com. Law Reps. 309. ⁸ 6 Id. 354.

suspicion attached to the case, having found a verdict for the defendant, the court would not disturb that verdict. *Abraham v. George*, 11 Price, 423. Where two persons exchange acceptances, and before the bills are mature one of them commits an act of bankruptcy, there is not such a debt due from him to the other as will sustain a commission, before the other has paid his own acceptance. *Sarratt v. Austin*, 4 Taunt. 200. Interest, where not expressed in the body of the bill, cannot be added so as to make up the amount of the debt. *Cameron v. Smith*, 2 B. and A. 305, *Ex parte Burgess*, 2 B. Moore, 745, 8 Taunt. 660, 1 S. C. A bill for 100*l.* though not due till after the act of bankruptcy, is a good petitioning creditor's debt to support a commission against the drawer, and the rebate of interest is not to be considered, for it is a present debt to the amount of 100*l.* *Brett v. Levett*, 13 East, 213.

Evidence of petitioning creditor's debt—prior act of bankruptcy.] By 6 G. IV. c. 16, s. 19, no commission shall be deemed invalid by reason of any act of bankruptcy prior to the debt of the petitioning creditor, provided there be a sufficient act of bankruptcy subsequent to such debt. Before this statute, though the bankrupt himself could not, yet a debtor to the estate might, in an action by the assignees, upon proof of an act of bankruptcy prior to the petitioning creditor's debt, and of a sufficient debt upon which a commission might be supported, resist the claim and defeat the commission. *Eden*, 43.

Evidence of trading.] By 6 Geo. IV. c. 16, s. 2, it is enacted, that all bankers, brokers, and persons using the trade or profession of a scrivener, receiving other men's monies or estates into their trust or custody, and persons insuring ships, or their freight, or other matters, against perils of the seas, warehousemen, wharfingers, packers, builders, carpenters, shipwrights, victuallers, keepers of inns, taverns, hotels, or coffee-houses, dyers, printers, bleachers, fullers, calenderers, cattle or sheep salesmen, and all persons using the trade of merchandize by way of bargaining, exchange, bartering, commission, consignment, or otherwise, in gross or by retail, and all persons who, either for themselves, or as agents or factors for others, seek their living by buying and selling, or by buying and letting for hire, or by the workmanship of goods or commodities, shall be deemed traders liable to become bankrupt; provided that no farmer, grazier, common labourer, or workman for hire, receiver general of the taxes, or member of or subscriber to any incorporated commercial or trading companies established by charter or act of parliament, shall be deemed as such a trader liable by virtue of this act to become bankrupt.

* 4 Eng. Com. Law Repts. 241.

Evidence of a trading which ceased before the 6 Geo. IV. c. 16, took effect, will not support a commission of bankrupt issued after that time. *Surtees v. Ellison*, 9 B. and C. 750.^a

The declarations of the bankrupt, made before the bankruptcy, have been admitted to prove the trading. *Parker v. Barker*, 1 B. and P. 9; but the propriety of receiving such evidence has been doubted. *Bromley v. King*, 1 R. and M. 228. Where the question was as to the intention with which the party had made certain purchases, Abbott, C. J. held that his declarations, at the time of the purchase of the goods, as to the mode in which he intended to dispose of them, were admissible to prove the intention. *Gale v. Halfknight*, 3 Stark. 56.^c

Evidence of trading—what persons are traders within the general words of 6 G. IV. c. 16, s. 2.] To prove a person a trader, evidence of both buying and selling is necessary. *Eden*, 3. But where it appeared that the party had ordered goods for the purpose, as he stated, of sending them abroad, and he said that he would give other goods in exchange for them, on it being objected that there was no evidence of selling, Per Abbott, C. J. "I cannot say that if a man buys, and represents himself as a dealer, and offers goods in exchange, that he does not buy to sell again. At least I must leave it to the jury, I cannot nonsuit upon it." *Millikin v. Brandon*, 1 C. and P. 380.^d The quantum of dealing is immaterial. *Patman v. Vaughan*, 1 T. R. 572, *Newland v. Bell, Holt*, 241,^e see *Gale v. Halfknight*, 3 Stark. 56.^c Thus the purchase of one lot of timber and the sale of a portion of it, will make a man a trader. *Hobroyd v. Gwynne*, 2 Taunt. 176. But such occasional acts as a schoolmaster selling books to his own scholars only; *Valentine v. Vaughan, Peake*, 75; a colonel of a fencible regiment selling horses occasionally at Tattersall's, *Ex-parte, Blackmore*, 6 Ves. 3; or a person who keeps hounds buying dead horses, and selling the skins and bones, *Summersett v. Jarvis*, 3 B. and B. 2,^f are not evidence of trading. And where a person buys more of an article than he wants, and sells the surplus, he does not thereby become a trader. See *Newland v. Bell, Holt*, 222.^e So a cowkeeper selling his cows unfit for use. *Carter v. Dean*, 1 Swans. 64. So a farmer buying and selling articles incidental to the occupation of his farm, as where a farmer buys pigs, feeds them on his stubbles, and resells them, some after a week, some after longer periods. *Papten v. Browne*, 7 Taunt. 409.^g See *Martin v. Nightingale*, 3 Bingh. 421.^h But where a farmer bought horses unfit for farming, and resold them, and avowed his intention to take out a license and become a horse-dealer, these facts were held to be evidence of trading. *Wright v. Bird*, 1 Price, 20. A drawing and re-drawing of bills of exchange and promissory notes, if there

^a 17 Eng. Com. Law Reps. 491. ^c 14 Id. 162. ^d 11 Id. 426. ^e 3 Id. 81, 7 Id. 322. ^f 2 Id. 157. ^g 13 Id. 33.

be a continuation of it with a view to gain a profit on the exchange, is a trafficking in exchange and trading. *Richardson v. Bradshaw*, 1 Atk. 128. See *Hankey v. Jones*, Cowp. 745, *Eden*, 4. Where the business of brickmaking is carried on as a mode of enjoying the profits of a real estate, it will not make the party liable to the bankrupt law; and there is no difference whether the party is a termor, or entitled to the freehold; but where it is carried on substantially and independently as a trade, it will do so. *Eden*, 4, citing *Sutton v. Wheeley*, 1 East, 442, *ex-parte Gallimore*, 2 Rose, 424, *ex-parte Harrison*, 1 Br. C. C. 173, *Parker v. Wills*, *ib.* (n). And in a late case it was ruled, that the owner of land who makes bricks from the clay of it, and buys chalk for the more convenient burning of the bricks, is not a trader. *Paul v. Dowling*, 1 M. and M. 263, *Hearne v. Rogers*, 9 B. and C. 577.¹ See also *Ex-parte Burgess*, 2 Gl. and J. 183. Whether a trader who has ceased to buy, but is selling off his stock, is liable to a commission, depends upon the circumstance whether there be an intention to exercise or resume the trading, which is a question for a jury. *Ex parte, Paterson*, 1 Rose, 402, *Eden*, 5. If a man has carried on a manufactory, his ceasing actually to work it does not for that reason make him cease to be an object of the bankrupt laws; if he continues to solicit orders, and holds himself out to the world as capable of executing orders in the course of his trade, he continues liable to be made a bankrupt. *Per Ld. Ellenborough, Wharam v. Routledge*, 5 Esp. 236. And where a person was proved to have been a trader by buying and selling fish during one season, Lord Ellenborough said that it must be presumed he still carried on his business in the usual way, and continued a trader down to the time of his bankruptcy. *Heanny v. Birch*, 3 Campb. 233, and see *Pont v. Dowling*, 1 M. and M. 268. Where business had been carried on by the party, in partnership with another, which partnership had been dissolved some years before, and no act of trading had been done for two or three years before the time when the petitioning creditor's debt accrued, but the concerns had not been ultimately wound up, and part of the stock still remained in the warehouse of the parties undisposed of, the jury found, under the direction of the court, that the trading continued. *Executors of Blackhouse v. Tarleton*, coram Ld. Ellenborough, 2 Stark. Ev. 143. An executor disposing of his testator's stock is not a trader, though he purchase other articles to make it marketable; but if he increase the stock, and continue to sell, he becomes a trader. *Ex parte Nutt*, 1 Atk. 102, *ex-parte Garland*, 10 Ves. 120, *Eden*, 5. An illegal trading will support a commission. *Cobb v. Symonds*, 5 B. and A. 516,² but see *Millikin v. Brandon*, 1 C. and P. 381.¹ Buying and selling land, or any interest in land, is not a trading. *Port v. Turton*, 2 Wils. 169.

¹ 17 Eng. Com. Law Reps. 449. ² 7 Id. 179. ¹ 11 Id. 436.

Under the general statement in the commission that the bankrupt got his living by buying and selling, any species of trading may be given in evidence. *Hale v. Small*, 2 B. and B. 25.^a

Evidence of trading—what persons are within the particular words of 6 G. IV. c. 16, s. 6.] A pawnbroker is a broker within the statute. *Rawlinson v. Pearson*, 5 B. and A. 124.^a So a shipbroker, *Pott v. Turner*, 6 Bingh. 702.^a Whether an insurance broker be within the same term has not been determined. *Ex parte Stevens*, 4 Madd. 256. See *Pott v. Turner*, 6 Bingh. 708.^a It seems probable that whenever it becomes necessary to determine the point, it will be resolved in the affirmative. *Eden*, 7. In order to make a man a money scrivener, it must be an occupation to which he resorts in order to gain his living. In the course of this occupation he must receive other men's monies into his trust or custody. He must carry on the business of being trusted with other people's monies, to lay out for them as occasion offers. *Per Gibbs, C. J., Adams v. Malkin*, 3 Campb. 534.

Evidence of act of bankruptcy.] By 6 G. IV. c. 16, s. 3, it is enacted, that if any such trader (*vide supra*) shall depart this realm, or being out of this realm shall remain abroad, or depart from his dwelling-house, or otherwise absent himself, or begin to keep his house, or suffer himself to be arrested for any debt not due, or yield himself to prison, or suffer himself to be outlawed, or procure himself to be arrested, or his goods, money, or chattels, to be attached, sequestrated, or taken in execution, or make, or cause to be made, either within this realm or elsewhere, any fraudulent grant or conveyance of any of his lands, tenements, goods, or chattels, or make, or cause to be made, any fraudulent surrender of any of his copyhold lands or tenements, or make or cause to be made, any fraudulent gift, delivery, or transfer of any of his goods or chattels, every such trader doing, suffering, procuring, executing, permitting, making, or causing to be made, any of the acts, deeds, or matters aforesaid, with intent to defeat or delay his creditors, shall be deemed to have thereby committed an act of bankruptcy.

And by section 4 it is enacted, that where any such trader shall, after this act shall have come into effect, execute any conveyance or assignment by deed, to a trustee or trustees, of all his estate and effects, for the benefit of all the creditors of such trader, the execution of such deed shall not be deemed an act of bankruptcy, unless a commission issue against such trader within six calendar months from the execution thereof by such trader, provided that such deed shall be executed by every such trustee within fifteen

^a 6 Eng. Com. Law Reps. 9. ^a 7 Id. 46. ^a 19 Id. 211.

days after the execution thereof by the said trader ; and that the execution by such trader, and by every such trustee, be attested by an attorney or solicitor, and that notice be given within two months after the execution thereof by such trader, in case such trader reside in London, or within forty miles thereof, in the London Gazette, and also in two London daily newspapers ; and in case such trader does not reside within forty miles of London, then in the London Gazette, and also in one London daily newspaper, and one provincial newspaper, published near to such trader's residence ; and such notice shall contain the date and execution of such deed, and the name and place of abode respectively of every such trustee, and of such attorney or solicitor.

And by section 5 it is enacted, that if any such trader having been arrested or committed to prison for debt, or on any attachment for non-payment of money, shall upon such or any other arrest or commitment for debt, or non-payment of money, or upon any detention for debt, lie in prison for twenty-one days, or having been arrested or committed to prison for any other cause, shall lie in prison for twenty-one days after any detainer for debt lodged against him and not discharged, every such trader shall be deemed to have thereby committed an act of bankruptcy ; or if any such trader having been arrested, committed or detained for debt, shall escape out of prison or custody, every such trader shall be deemed to have thereby committed an act of bankruptcy from the time of such arrest, commitment, or detention ; provided that if any such trader shall be in prison at the time of the commencement of this act, such trader shall not be deemed to have committed an act of bankruptcy by lying in prison, until he shall have lain in prison for the period of two months.

And by section 6 it is enacted, that if any such trader shall file in the office of the Lord Chancellor's secretary of bankrupts a declaration in writing signed by such trader, and attested by an attorney or solicitor, that he is insolvent or unable to meet his engagements, the said secretary of bankrupts, or his deputy, shall sign a memorandum that such declaration hath been filed, which memorandum shall be authority for the printer of the London Gazette, to insert an advertisement of such declaration therein ; and every such declaration shall, after such advertisement inserted as aforesaid, be an act of bankruptcy committed by such trader at the time, when such declaration was filed, but no commission shall issue thereupon, unless it be sued out within two calendar months next after the insertion of such advertisement, and unless such advertisement shall have been inserted in the London Gazette within eight days after such declaration was filed. By the same section, the gazette containing such advertisements shall be evidence to be received of such declaration having been filed. And by section 7,

the declaration having been concerted between the bankrupt and any creditor, or other person, shall not invalidate the commission.

By section 8, a trader, after a docket struck against him, compounding with the person who struck the same, whereby such person may receive more in the pound than the other creditors, is guilty of an act of bankruptcy. By section 9, traders having privilege of parliament, committing any of the aforesaid acts of bankruptcy, may be proceeded against as other traders, though not subject to arrest or imprisonment. By section 10, a trader having privilege of parliament, not paying or compounding to the satisfaction of his creditor, and also entering an appearance to the action within one month, is guilty of an act of bankruptcy. And by section 11, a trader having privilege of parliament, disobeying the order of any court of equity, or in bankruptcy, or lunacy, for payment of money, after service, and peremptory day fixed, is guilty of an act of bankruptcy.

The most important decisions with regard to the acts of bankruptcy above enumerated will now be noticed.

Evidence of act of bankruptcy—departing the realm.] It must be shown that the trader departed the realm *with intent* to delay his creditors, and therefore, though the creditors be in fact delayed, yet if the intent is wanting, there is no act of bankruptcy. *Warner v. Barber*, Holt, 175,* *Windham v. Paterson*, 1 Stark. 145.* But where the departing the realm must necessarily cause a delay, it will be an act of bankruptcy, for a person may be supposed to foresee and to intend what is the necessary consequence of his own acts. *Ramsbottom v. Lewis*, 1 Campb. 280. Therefore where a trader went abroad in consequence of having killed his wife, it was held an act of bankruptcy. *Woodier's case*, B. N. P. 39; and see *Raikes v. Poreau*, *Vernon v. Hankey*, Co. B. L. 111. Where a trader departed the realm, leaving a letter behind him, and on the following day wrote another letter from Calais, it was held that both letters were admissible to show with what intention he departed; and *per Best*, C. J. the declarations in order to be admissible, must be made, or the letters written at the time of the act in question; but it is sufficient if they are written at any time during the continuance of the act; the departing the realm is a continuing act, and these letters were written during its continuance. *Rawson v. Haigh*, 2 Bingh. 99,* see *Maylin v. Eyloe*, 2 Str. 809. Going to Ireland is a departing the realm. *Williams v. Nunn*, 1 Taunt. 270.

Evidence of act of bankruptcy—departing from his dwelling-house.] Notwithstanding a decision to the contrary, *Barnard v. Vaughan*, 8 T. R. 149, it is now settled that actual delay need not

be proved, an intent to delay being sufficient. *Wilson v. Norman*, 1 *Esp.* 334, *Hammond v. Hicks*, 5 *Esp.* 139, *Holroyd v. Whitehead*, 3 *Campb.* 530, *Eden*, 18, *Robertson v. Liddell*, 9 *East*, 487. Even where a trader departed under a mistaken idea that an officer who called had a writ for him, it was held an act of bankruptcy. *Ex parte Bamford*, 15 *Ves.* 449. Where the act of departing is equivocal, it is a question for the jury whether it was with intent to delay creditors, as where two partners left their shop, stating their purpose to be to get some bills discounted, and telling their shopman if any creditor called, to make an excuse, in which case the jury found the intent, no evidence being given of an attempt to discount the bills. *Deffle v. Desanges*, 8 *Taunt.* 671, and see *Aldridge v. Ireland*, cited 1 *Taunt.* 273. A trader who has no settled house, or counting house, but takes up a temporary abode at a public-house in the place to which his business carries him, commits an act of bankruptcy by departing from such public-house with intent to delay his creditors. *Holroyd v. Gwynne*, 2 *Taunt.* 176.

In order to prove the intent with which the bankrupt departed from his dwelling-house, evidence of what he said is admissible as part of the *res gesta*. *Ambrose v. Clendon*, *Ca. temp. Hardw.* 267. But it must be shown that the declaration was made at the time of the act, or at all events so near it as to form part of one and the same transaction. Thus a deposition stating that the bankrupt had admitted that he had absented himself for the purpose of avoiding his creditors, but not stating the time of the admission, was held to be no evidence of an act of bankruptcy. *Marsh v. Meager*, 1 *Stark.* 353. So it was held by Lord Ellenborough, that conversations taking place subsequently to the commission of the act constituting the act of bankruptcy, were inadmissible. *Robson v. Kemp*, 4 *Esp.* 234. In one case it was held that the declarations of the bankrupt after his return home, as to the reason of his absence, ought to have been admitted; *Bateman v. Bailey*, 5 *T. R.* 512, and see *Maylin v. Eyloe*, 2 *Str.* 809, *Rawson v. Haigh*, 2 *Bingh.* 99, ante, p. 424; but the correctness of this decision has been doubted. See 2 *Evans's Pothier*, 285, *Eden*, 360, 2 *Phil. Ev.* 339, *Smallcombe v. Bridges*, *McClel.* 45. Such evidence was however admitted by Parke, J. in *Newman v. Stretch*, 1 *M. and M.* 338. The declaration of the bankrupt that he departed to avoid a writ is evidence of an act of bankruptcy without proof of the writ, the debt or the existence of creditors. *Id.*

Evidence of an act of bankruptcy—otherwise absent himself.] It has been held sufficient evidence of the trader absenting himself to show, that after being arrested he fled from the officer into the house of another person where the door was fastened, and the offi-

• 4 *Eng. Com. Law Reps.* 244. • 2 *Id.* 423. • 9 *Id.* 335.

cer not permitted to enter, and that he said he remained there for fear of other creditors. *Bayley v. Schofield*, 1 *M. and S.* 338. So where the trader went into the back shop of a neighbour's house to avoid an officer who, he said, had a writ against him. *Chenoweth v. Hay*, *Id.* 676, and see *Wilson v. Norman*, 1 *Esp.* 334. And again, where a trader left his counting-house (to which he never returned) taking away his books with him, and went to his country-house, where he slept two or three nights afterwards, he was held to have committed an act of bankruptcy. *Judine v. Da Cossen*, 1 *N. R.* 234. So where there were two partners, one of whom resided in Manchester and the other in London, and the London partner having left his house without intent to delay his creditors, and having been a few days on a visit at Manchester, both of them left their counting-house there to avoid an arrest, carrying with them their books of accounts, this was held an act of bankruptcy. *Spencer v. Billing*, 3 *Campb.* 312. The words *otherwise absent himself*, are not confined to absenting himself from his dwelling-house, or any particular place, and therefore, where a trader who was in the habit of attending the Royal Exchange, left it on seeing one of his creditors whom he had appointed to meet there, desiring a friend to say he was not there, it was held an act of bankruptcy. *Gillingham v. Luig*, 6 *Taunt.* 532.* But where a trader who, on being arrested, had obtained his liberty upon a promise to attend and execute a bail bond, did not attend, it was held not an act of bankruptcy. *Schooling v. Lee*, 3 *Stark.* 149.* And so with regard to a mere failure to keep an appointment with a creditor. *Tucker v. Jones*, 2 *Bingh.* 2.* So where the trader was informed by the attorney of the petitioning creditor that he had delivered a warrant to arrest him to an officer, and was advised by him to repair to his office to avoid a public arrest, which the trader did, it was held no act of bankruptcy. *Mills v. Elton*, 3 *Price*, 142. It is immaterial whether a creditor was actually delayed or not. *Chenoweth v. Hay*, 1 *M. and S.* 676.

Evidence of act of bankruptcy—begin to keep his house.] It was formerly thought that in order to prove a beginning to keep house, with intent to delay creditors, an actual denial of a creditor must be proved, *Garrat v. Moule*, 5 *T. R.* 575; but it is now settled that such actual denial is only one mode of proof by which the act of bankruptcy may be established, and that it may be proved by any other evidence to the same effect. *Dudley v. Vaughan*, 1 *Campb.* 271, *Robertson v. Liddell*, 9 *East*, 487, *Lloyd v. Heathcote*, 2 *B. and B.* 388, 5 *B. Moore*, 129, *S. C.* Where a trader withdraws from his counting-house on the ground floor, to his parlour up stairs, for privacy and seclusion, and with a view to avoid the fair importunity and

* 1 *Eng. Com. Law Reps.* 476. * 14 *Id.* 173. * 9 *Id.* 291.

* 6 *Id.* 165.

personal solicitation of his creditors, it is an act of bankruptcy. *Dudley v. Vaughan*, 1 *Campb.* 271, and see *R. v. Bell*, cited 1 *M. and S.* 354. Where the partners in a banking-house reside in the same place in which the bank is situated, and they close the windows and shutters of the bank, this is "a beginning to keep house." *Cumming v. Bailey*, 6 *Bingh.* 363. But it is not an act of bankruptcy in those partners who are not resident in the same place. *Mills v. Bennet*, 2 *M. and S.* 556. *Ex-parte, Mavor*, 19 *Ves.* 543. *Hawkins v. Whitten*, 10 *B. and C.* 217. A general order to be denied to all comers is, in itself, evidence of an act of bankruptcy. *Lloyd v. Heathcote*, 2 *B. and B.* 388, 5 *B. Moore*, 129. And where a trader having been arrested on the 20th of May, desired his servants not to let into the house any person whom they did not know, and, on the morning of the 21st, the doors of the house were kept shut, and no person was admitted without it being ascertained from the window who he was, it was held an act of bankruptcy, though no creditor was actually denied. *Harvey v. Ramsbottom*, 1 *B. and C.* 55.* If a trader secretes himself in the house of a friend, where he is lodging, and where persons are in the habit of calling upon him, it is an act of bankruptcy. *Curteis v. Willis*, 1 *R. and M.* 58, 4 *D. and R.* 224,* *S. C.* And though the trader was seen by the creditor at the time of the denial, it is still an act of bankruptcy. *Ex parte Bamford*, 15 *Ves.* 451. Where a trader gives a general order to be denied, and is denied to a particular creditor, it is such a beginning to keep house as will constitute an act of bankruptcy, although the trader immediately overtakes the creditor, and tells him that he is not afraid of him but of another creditor. *Mucklow v. May*, 1 *Taunt.* 479, and see *Colkett v. Freeman*, 2 *T. R.* 59. It must be proved that the order to deny was given by the trader. *Dudley v. Vaughan*, 1 *Campb.* 271, *Ex parte Foster*, 17 *Ves.* 416. But if a trader in his own house hears himself denied to a creditor and does not come forward, this if done with an intent to delay creditors is an act of bankruptcy, though he has given no directions to be denied. *Smith v. Moon*, 1 *M. and M.* 458.

In answer to this general evidence of denial it may be shown that the order was not given with intent to delay, as that it was to deny the trader to any one who should come while he was at dinner, or engaged in business. *Shew v. Thompson*, *Holt*, 159,* *Lloyd v. Heathcote*, 2 *B. and B.* 392.* A simple denial to a creditor is not enough to make a trader a bankrupt; he may not only order himself to be denied at unseasonable hours in the night, but in the course of the day when he is taking his meals, and on other occasions, which may be easily imagined, he may refuse to see his creditors without meaning to delay them, and therefore, without committing an act of bankruptcy, although they should for a time be

delayed. *Per Lord Ellenborough, Smith v. Currie*, 3 *Campb.* 380. So a denial on a Sunday. *Ex parte Preston*, 2 *V. and P.* 312. But where a trader ordered his servant to say, if any creditors called, that he was not at home, and he was accordingly denied, being ill in bed at the time, it was held that it was properly left to the jury whether this was an act of bankruptcy, and that they were warranted in finding it so. The creditor should have been informed that the trader was at home but ill. *Lazarus v. Waltham*, 5 *B. Moore*, 313.*

Evidence of act of Bankruptcy—fraudulent conveyance, &c.] By the new act (sec. 3.) two descriptions of fraudulent transactions are made acts of bankruptcy, viz., *any fraudulent grant, or conveyance, of any of the trader's lands, tenements, goods, or chattels, and also any fraudulent gift, delivery, or transfer, of any of his goods or chattels, ante*, p. 422. A bill of exchange is a chattel within the above section. *Cumming v. Bailey*, 6 *Bingh.* 363.⁴ A fraudulent delivery of goods will not be an act of bankruptcy unless it is in the nature of a gift or transfer, so that where goods are removed with intent to delay a creditor, but the party in whose custody they are placed has no claim given to him over them, this is not an act of bankruptcy. *Cotton v. James*, 1 *M. and M.* 273. As all the acts which have heretofore been determined to be fraudulent preferences will, under the latter of these provisions, be henceforth considered as acts of bankruptcy, and, as all the doctrine applicable to fraudulent preference by deed attaches also to all fraudulent preferences, it will be most convenient to consider them together. *Eden*, 25. A creditor who was executed, or been privy to, or acted under the fraudulent deed, cannot set it up as an act of bankruptcy. *Bamford v. Baron*, 2 *T. R.* 594 (n), *Jackson v. Irwin*, 2 *Campb.* 49, *Back v. Gooch*, *Holt*, 13,^a *Tope v. Hockin*, 7 *B. and C.* 101.⁵

Evidence of act of bankruptcy—fraudulent conveyance, &c.—deeds, fraudulent at common law or under stat. 13 Eliz. c. 5.] A grant, or conveyance may be void either under the statute 13 *Eliz. c. 5*, or at common law, or as being contrary to the policy of the bankrupt laws. The facts necessary to be proved in order to establish fraud, so as to avoid a deed at common law, will be stated hereafter. See *post*, "*Actions against Sheriffs*," and *Index tit. "Fraud."*

Evidence of act of bankruptcy—fraudulent conveyance, &c.—deeds, &c., fraudulent as contrary to the policy of the bankrupt law.] The cases formerly decided relative to assignments by deed of all a trader's property, will now, under the latter of the clauses above-mentioned, be applicable to all assignments, whether under deed or not. The assignment of *all* a trader's property, whether upon trust

* 16 *Eng. Com. Law Reps.* 401. ⁴ 19 *Id.* 104. ⁵ 3 *Id.* 9. ⁶ 14 *Id.* 22.

for the benefit of one creditor, *Wilson v. Day*, 2 Burr. 877, or of several, *Compton v. Bedford*, 1 W. Bl. 362, or of all to the exclusion of one, *Ex parte Foord*, cited 1 Burr. 477, is an act of bankruptcy. So when a trader conveyed the whole of his property to a creditor, upon trust, to satisfy his debt, and to pay over the surplus, if any, to the trader, who then knew himself to be insolvent, it was held an act of bankruptcy, and that such conveyance was invalid, though the bill of sale was given by the trader, when under arrest at the suit of the particular creditor for a just debt. *Newton v. Chantler*, 7 East. 187. So where A., a trader, conveyed all his effects (of which he remained in possession) as a security to B., a banker, who had agreed to honour his drafts, subject to a defeasance, on A.'s paying such sums as B. advanced, with a covenant that on A. failing to perform his part, B. should take possession of the effects, the conveyance was held fraudulent. *Worseley v. Demattos*, 1 Burr. 467. So where a trader, being in distressed circumstances, assigned all his estate to a creditor as a security for an unliquidated sum, without delivering possession, the assignment was held fraudulent. *Wilson v. Day*, 2 Burr. 827. In the two last cases the assignment appears to be fraudulent on three grounds. 1. As an undue preference of the particular creditor in contemplation of bankruptcy. 2. As contrary to the policy of the bankrupt law, being an assignment of all the trader's property, whereby he was disabled from carrying on his trade; and 3. At common law; the want of transfer of the possession being evidence of the fraud.

An assignment of all a trader's effects, even upon trust for the benefit of all his creditors, has been held to be an act of bankruptcy, on the ground, first, that the trader necessarily deprives himself, by such an act, of the power of carrying on his trade, and, secondly, that he endeavours to put his property under a course of application and distribution among his creditors different from that which would take place under the bankrupt law. *Dutton v. Morrison*, 17 Ves. 199. In general, an assignment of so much of a man's stock as disables him from carrying on his business, is an act of bankruptcy. *Hooper v. Smith*, 1 W. Bl. 442. A colourable exception of a small portion of the property will not prevent the assignment from operating as an act of bankruptcy. Thus, where the assignment was made, for the benefit of several creditors, of all the trader's goods and stock in trade, (some few particulars excepted, to the amount of about 100*l.*) and the deed was executed at midnight, and the trader absconded next morning, the deed was held void, the interest omitted being too minute to make a difference. *Compton v. Bedford*, 1 W. Bl. 362. So where the trader assigned all his effects, goods, stock in trade, and book debts (except household goods, watches, plate, bills of exchange, inland bills, and promissory notes, and cash then by him, and also except

a large parcel of ginger), the exception was considered colourable, and Lord Hardwicke was clear that the deed was an act of bankruptcy, *Ex parte v. Foord*, cited 1 Burr. 477, see *Berney v. Davison*, 1 B. and C. 408,⁵ *Berney v. Vyner*, *Id.* 432.⁶ So an assignment of all a trader's stock in trade (but not of his household goods and debts, both of which were very trifling) has been held an act of bankruptcy. *Law v. Skinner*, 2 W. Bl. 996.

It is said by Lord Kenyon, that all the cases, without a single exception, where the assignment of his property by a trader had been deemed fraudulent and an act of bankruptcy, had been where it had been given for a by-gone and before-contracted debt; but that it never could be taken to be law that a trader could not sell his property when his affairs became embarrassed, or assign them to a person who would assist him in his difficulties as a security for any advances such person might make to him. *Whitwell v. Thompson*, 1 Esp. 72, and see *Manton v. Moore*, 7 T. R. 67. *Hunt v. Mortimer*, 10 B. and C. 44.

An assignment of part of a trader's effects to a particular creditor, (unlike, in this respect, to an assignment of the whole,) carries with it no intrinsic evidence of fraud; a trader must in the course of his business have the power to make over parts of his property, either for past debts or for further advances. But when such act is done in contemplation of bankruptcy, and consequently with the intent to give the creditor a preference over the other creditors, it is contrary to the spirit and policy of the bankrupt law, and it is not only void, but whether it be by deed, (as formerly,) or (as now) by gift, delivery, or transfer of goods and chattels, is an act of bankruptcy. *Eden*, 32. The declaration of the bankrupt that he departed to avoid a writ is evidence of an act of bankruptcy without proof of the writ, the debt, or the existence of creditors. *Id.* In one case it appears to have been the opinion of the Court of King's Bench, that a deed voluntarily executed by a trader, in order to give a preference to particular persons to the prejudice of his general creditors, was fraudulent and an act of bankruptcy although not made in contemplation of bankruptcy. *Pulling v. Tocker*, 4 B. and A. 382,⁷ but see *Hartshorn v. Stodden*, 2 B. and P. 582. *Fidgeon v. Sharp*, 1 Marsh. 196,⁸ *post*. But it has since been held that in order to render the conveyance, &c. of part of the bankrupt's effects fraudulent, something more is necessary, as contemplation of bankruptcy. *Gibbons v. Phillips*, 7 B. and C. 529.⁹ Whether the party contemplated bankruptcy is a question for the jury under all the circumstances of the case. *Poland v. Glyn*, 4 Bingh. 92 (n), *Hock v. Jones*, 4 Bingh. 20.¹⁰ Proof that a trader is in embarrassed circum-

⁵ 5 Eng. Com. Law Reps. 134. ⁶ 5 *Id.* 156. ⁷ 6 *Id.* 465.

⁸ 1 *Id.* 183. ⁹ 14 *Id.* 97. ¹⁰ 13 *Id.* 328.

stances is not conclusive evidence that he contemplated bankruptcy. A., a trader, purchased goods from B. on the 8th Oct. for exportation, but finding that he must stop payment, and that he could not apply the goods to the purpose for which they were bought, he returned them on the 16th Oct. to B., and on the 17th he stopped payment; though, expecting remittances from abroad more than sufficient to pay his debts, he had no doubt his creditors would give him time. They, however, refusing, he was made bankrupt on 2nd Nov. Under these circumstances it was held, that the jury were warranted in finding that the delivery of the goods was not made in contemplation of bankruptcy. *Fidgeon v. Sharp*, 1 Marsh. 196,* and see *Wheelright v. Jackson*, 5 Taunt. 109,* *Moore v. Barthorp*, 1 B. and C. 5.* In order to constitute a fraudulent preference, the transaction on the part of the trader must be voluntary, and it is immaterial whether the creditor had or had not an act of bankruptcy in contemplation at the time the creditor pressed for payment or security, and thereby obtained such payment or security. *Hartshorn v. Slodden*, 2 B. and P. 583, *Crosby v. Crouch*, 11 East, 261. Nor will it render such a transaction fraudulent, that it was conducted under circumstances of secrecy. If the creditor were entitled to demand, and demanding, to receive a security in goods for a running debt, upon what principle is he obliged to insist upon the transaction being conducted by his debtor with any particular circumstances of publicity, and which might be in other respects injurious to the general credit of such debtor? *Per Lord Ellenborough*, 11 East, 261. If a trader give preference to a creditor under an apprehension, however groundless, of legal process, such preference is valid. *Thompson v. Freeman*, 1 T. R. 155. And where a creditor, knowing his debtor to be in distressed circumstances, and not able to pay his debts, applied to him for a security, and took part of his stock in trade for that purpose, it was held no undue preference, though the creditor did not threaten a suit in case of refusal. *Smith v. Payne*, 6 T. R. 152. So where A., a shopkeeper, procured B. to discount accommodation bills drawn by him and accepted by third persons, and B. afterwards required A. to give him a collateral security for the payment of the bills, upon which A. secretly deposited with him a quantity of goods from his shop, to be sold for B.'s benefit, if the bills should not be paid, and soon after A. became bankrupt, and the bills were dishonoured, it was held that the depositing of the goods in this manner, as a security, was not a preference in contemplation of bankruptcy. *Crosby v. Crouch*, 2 Campb. 166, 11 East, 256, S. C. The consideration upon which a payment, made to an importunate creditor, of a debt actually due, has been allowed to be valid, has not been that he might resort to a suit to enforce payment, but that his demand

* 1 Eng. Com. Law Reps. 183. • 1 Id. 30. • 8 Id. 5.

repels the presumption that the bankrupt, upon the eve of bankruptcy, made a distinction among his creditors, and spontaneously favoured one of them to the prejudice of the rest. A demand of further security for a debt not yet due, has the same effect, and in neither case is there any fraud upon the bankrupt laws, on which ground alone transactions previous to the bankruptcy can be set aside. *Per Lord Ellenborough, Ibid.* Again, where a trader, at the instance of his creditor, gave goods out of his shop, in part payment of a bond not then due, the transaction was held valid. *Hartshorn v. Slodden*, 2 B. and P. 582, 11 East, 260. And again, where a trader, without solicitation, and in contemplation of stopping payment, put three cheques into the hands of his clerk, to be delivered to a creditor at the counting-house of the latter, but, before the delivery, the creditor called upon the trader and demanded payment of his debt, it was ruled that the intention of making a voluntary preference not having been consummated, the payment stood good. *Bayley v. Ballard*, 1. Campb. 416, but see *Singleton v. Buller*, 2 B. and P. 283, post. A debtor being insolvent and in prison went under a day rule to receive a sum of money due to him from a fire office; a creditor met him there and demanded and received, out of the money received, payment of his debt, having no notice of the debtor's insolvency and imprisonment. Eight days afterwards a commission issued against the debtor. It was held that this was no fraudulent preference. *Churchill v. Trease*, 5 Bingh. 177. A trader had property to a considerable amount standing in the custom-house in his own name, but in fact purchased on account of A. A bill deposited with A. by the trader, as a security, appearing to be a forgery, A. insisted on having the property transferred to himself, which was done on the 14th and 5th of January. On the 17th the trader became bankrupt. Lord Ellenborough said that the question for the jury was, whether the transfer was voluntary, or made under the apprehension that a degree of force, civil or criminal, was about to be applied. *De Tastet v. Carroll*, 1 Stark. 83, and see *Atkins v. Seward*, *Manning's Index*, 62, 63. But where a trader being pressed by a creditor for payment, or security, one or other of which he said he would have, gave a bill of sale of certain wools and cloths in a mill, apparently the whole of his stock, and immediately left his business and home, and became bankrupt, it was held that, inasmuch as the act done did not redeem the trader, even from any present difficulty, which is the ordinary motive for such an act when really done under the pressure of a threat, it was evidence that it was not done under such a pressure but voluntarily, and with a view to prefer the particular creditor in contemplation of bankruptcy. *Thornton v. Hargreaves*, 7 East, 544. The acceptor of a bill of exchange

two days before the expiration of the time for which the bill was originally drawn, called upon the indorser, and informed him privately that he was insolvent, the indorser insisted on being paid the amount of the bill, offering at the same time to become security to the creditors for so much as the estate should produce, whereupon the acceptor paid it, and four days after became bankrupt. It appeared also, that the bill had been altered so as to make it fall due before this transaction, but without the indorser's knowledge. These circumstances were held to afford evidence of a fraudulent preference. *Singleton v. Butler*, 2 B. and P. 283, see *Bayley v. Ballard*, 1 Campb. 416, *supra*. Where a trader, being pressed, conveyed estates in trust to sell and pay the pressing creditor, with a further trust to pay debts to certain relatives, it was held a preference in contemplation of bankruptcy. *Morgan v. Horseman*, 3 Taunt. 241.

A sale of part of a trader's effects may be an act of bankruptcy, if the sale be in fact fraudulent, without reference to its being made in contemplation of bankruptcy. Thus if a sale take place under such circumstances that the buyer as a man of business and understanding ought to suspect and believe that the seller means by it to get money for himself in fraud of his creditor, it is fraudulent and an act of bankruptcy. *Cook v. Caldecott*, 1 M. and M. 522.

Evidence of act of bankruptcy—lying in prison.] This act of bankruptcy does not relate to the first day of the imprisonment. *Higgins v. M'Adam*, 3 Young and Jar. 1. *Moser v. Newman*, 6 Bingh. 556.^a See *Tucker v. Barrow*, 1 M. and M. 137. In order to render a lying in prison twenty-one days an act of bankruptcy, the arrest must be for a subsisting legal debt. *Eden*, 35. A penalty due to the crown has been considered a sufficient debt. *Cobb v. Symonds*, 5 B. and A. 516.^c The time of lying in prison commences from the first arrest, the day of arrest being included. *Glassington v. Rawlins*, 3 East, 407, 3 Stark. 73.^a Where bail is put in, and the defendant surrenders in discharge of his bail, the time is computed from the surrender, *Tribe v. Webber*, Willes, 464; but, where the bankrupt was arrested in Kent on the 31st March, and on the 8th May brought by *habeas corpus* to be bailed, and on the road to the judge's chambers, was permitted to call at his attorney's house, which was out of the county of Kent, whence he was carried directly to a judge's chambers, to be bailed, and was bailed accordingly, and immediately surrendered by the bail, it was held that the act of bankruptcy had relation to the 31st March. *Ross v. Green*, 1 Burr. 437. If the defendant is suffered to go at large after the arrest, and afterwards returns into custody, the time is computed from the return. *Barnard v. Palmer*, 1 Campb. 509. Where the defendant, at the time of the arrest, was sick, and con-

^a 19 Eng. Com. Law Reps. 165. ^c 7 Id. 179. ^a 14 Id. 165.

sequently suffered to remain some time in his own house, the key of which was kept by the officer's follower not named in the warrant, the time was held to run from the arrest. *Stevens v. Jackson*, 4 *Campb.* 164, 6 *Taunt.* 108, v. S. C. And so where the party has the benefit of day rules during the period. *Soames v. Watts*, 1 C. and P. 400.* If a commission issues before the time expire, it cannot be supported, though it would be no objection that the requisite time had not expired when the docket was struck. *Gordon v. Wilkinson*, 8 T. R. 507, *Wydown's case*, 14 Ves. 80, *Ex-parte Dufresne*, 1 V. and B. 51. The arrest may be proved by an examined copy of the writ, and return of *cepi corpus*, or by proof of the writ, the warrant, and the arrest, *vide ante*, p. 304. The fact of lying for the twenty-one days in prison may be proved by the production of the prison books. *Salle v. Thomas*, 3 B. and P. 188, *ante*, p. 112. The cause of the commitment may be proved by production of the *committitur*. *Ibid.*

Evidence of act of bankruptcy—filing petition to take the benefit of the insolvent act.] This act of bankruptcy is introduced in the insolvent act, 7 Geo. IV. c. 57, and is not contained in the new bankrupt act. The office copy of the petition is made evidence of the act of bankruptcy, but it is not to be an act of bankruptcy, unless the party be declared bankrupt before the time advertised in the gazette for hearing the petition, or within two calendar months from the filing of it, within which time it will have the effect of avoiding the assignment under the insolvent act.

Evidence of the commission and assignment, &c.] By 6 Geo. IV. c. 16, s. 96, it is enacted, that in all commissions issued after this act shall have taken effect, no commission of bankruptcy, adjudication of bankruptcy by the commissioners, or assignment of the personal estate of the bankrupt, or certificate of conformity, shall be received as evidence in any court of law or equity, unless the same shall have been first so entered of record as aforesaid (*see sect. 95*), and the Lord Chancellor may, upon petition, direct any depositions, proceedings, or other matter relating to commissions of bankruptcy, to be entered of record as aforesaid. Provided, that upon the production in evidence of any instrument so directed to be entered of record, having the certificate thereon purporting to be signed by the person so appointed to enter the same, or his deputy, the same shall, without any proof of such signature, be received as evidence of such instrument having been so entered on record as aforesaid.

And by section 97 it is enacted, that in every action, suit, or issue, office copies of any original instrument, or writing, filed in the office, or officially in the possession of the Lord Chancellor's

* 1 Eng. Com. Law Reps. 325. * 11 Id. 436.

secretary of bankrupts, shall be evidence to be received of every such original instrument or writing respectively.

The commission is proved by producing it under the great seal, with the certificate of enrolment thereon, as mentioned above. The assignment ought, in strictness, to be proved by production of the deed with the certificate of enrolment, and evidence of the execution by the commissioners, but by the general courtesy of practice in the courts, it is admitted, unless notice to dispute it has been given. *Tucker v. Barrow*, 1 M. and M. 137. *Read v. Cooper*, 5 Taunt. 89,* *Eden*, 353. However, in the case of *Hunt v. Connor*, 2 Chitty, Coll. Stat. 110, Lord Tenterden was inclined to think the bargain and sale (where necessary to be proved, in actions relating to the bankrupt's real property) must be produced and proved in the same manner as other deeds; and see *Gomersal v. Serle*, 2 Y. and J. 5. The new bankrupt act is silent as to the time of enrolment, but by 27 Hen. VIII. c. 16, the deed must be enrolled within six months after its date, or it becomes null and void. *Thomas v. Popham*, *Dyer*, 218 (b). The title of the assignees does not relate back to the date of the bargain and sale, but only to the time of enrolment, and therefore, in ejectment, where the demise is laid between the date of the indenture and the enrolment, the assignees cannot recover. *Perry v. Bowers*, *T. Jones*, 196. The indorsement on the bargain and sale signed by the proper officer will be conclusive evidence of the enrolment, and of the time when it was enrolled. *Kinnersley v. Orpe*, *Dougl.* 56. *R. v. Hooper*, 3 Price, 495.

If, in pursuance of the new act, sec. 96, the Chancellor has directed any depositions, proceedings, or other matters relating to the commission to be entered of record, as the officer is not authorised to make copies, it will of course be necessary in such cases to have an examined copy of the record. *Eden*, 353, 2 *Phill. Ev.* 326.

By 6 Geo. IV. c. 16, s. 98, all commissions, conveyances, and other instruments relating to the estates of bankrupts, are from 1st Sept. 1825, exempted from stamp duty.

Evidence with regard to the title of assignees under joint and separate commissions, &c.] Where separate commissions have been issued against several persons, and the same persons are appointed assignees under each, they may describe themselves as assignees of those bankrupts generally, and may give evidence of a joint demand due to all the bankrupts, *Scott v. Franklin*, 15 East, 428, *Streatfield v. Halliday*, 3 T. R. 779, 2 *Saund.* 47, o (n), but in such action they cannot recover also for separate demands due to each of the bankrupts. *Hancock v. Haywood*, 3 T. R. 433. And where there are separate commissions against several partners, and different assignees under each commission, in declaring for a joint debt the

* 1 Eng. Com. Law Reps. 26.

assignees must not describe themselves as joint assignees, but as assignees of each bankrupt respectively. *Ray v. Davis*, 8 Taunt. 134,⁷ 2 B. Moore, 3, S. C. The assignees under a joint commission against A. and B. in suing on a separate contract made with A. may describe themselves generally as the assignees of A. without noticing B. *Stonehouse v. Da Silva*, 3 Campb. 399, *Harvey v. Morgan*, 2 Stark. 17.⁸ And the assignees under a joint commission against two partners may recover in the same action debts due to the partners jointly, and debts due to them separately. *Graham v. Mulcaster*, 4 Bingh. 115.⁹ But assignees under a joint commission against A. and B. who have committed acts of bankruptcy at different times, cannot recover money received by the defendant between the acts of bankruptcy, either as money had and received to the use of the bankrupts, or to the use of the assignees. *Hogg v. Bridges*, 8 Taunt. 200.¹⁰ Where the assignees of two partners declared in trover upon the possession of the bankrupts only, and it appeared in evidence that the greater part of the goods in question belonged to one of the partners only, before the commencement of the partnership, and had never been brought into the partnership fund, and that the residue formed part of the joint estate, Lord Kenyon held that the plaintiffs could recover the residue only, whereas, if there had been a count on the possession of the assignees, as it was a joint commission, and the assignment under such commission passes both joint and separate effects, the whole might have been recovered. *Cock v. Tunno*, Selw. N. P. 1316, and see 2 Saund. 47, o (n).

Where the appointment of an assignee is vacated by the Chancellor and a new assignee is appointed, the latter is assignee by relation, and may sue in his own name as assignee on a contract made by the former assignee. *Aldritt v. Kettridge*, 1 Bingh. 355.¹¹

Evidence in particular actions by assignees of bankrupts.] In many cases of transactions between the bankrupt and others, after an act of bankruptcy committed, the assignees have the option, either of adopting the contract made by the bankrupt, and suing the party in an action of assumpsit, or of disaffirming the contract, and suing him for damages in an action of trover. They cannot, however, disaffirm the transaction, if it appears that they have once affirmed it. *Brewer v. Sparrow*, 7 B. and C. 310.¹² Therefore, where assignees had recovered a sum of money from the bankrupt's banker, which had been received by him, and the amount of which had been paid over to a creditor of the bankrupt, with a knowledge of the bankruptcy, it was held that they could not sue the creditor who had received it; for having disaffirmed the banker's acts in the former

⁷ 4 Eng. Com. Law Reps. 45. ⁸ 3 Id. 222. ⁹ 13 Id. 367. ¹⁰ 4 Id. 70.
¹¹ 8 Id. 346. ¹² 14 Id. 50.

action, they could not in the present suit affirm them as payments of the bankrupt's money. *Vernon v. Hanson*, 2 T. R. 287. So where the bankrupt, before his bankruptcy, had purchased goods on credit, and re-sold them, fraudulently, at under-prices, it was ruled that assumpsit for goods sold and delivered could not be maintained by the assignees against the purchaser to recover the difference in value, which would be both to affirm and disaffirm the contract. *Burra v. Clark*, 4 Campb. 355. Money had and received has been held to be maintainable against a person, who, after taking the goods of the bankrupt in execution after an act of bankruptcy, has taken them under a bill of sale from the sheriff. *Reed v. James*, 1 Stark. 134.* And where a bankrupt, after an act of bankruptcy, contracted with a factor, to whom he had delivered goods for sale, and who had accepted a bill upon the strength of the goods, to return the goods if he would return the bill, and did return the bill, it was ruled that the assignees might adopt this contract and recover against the factor for the non-delivery of the goods. *Buller v. Carver*, 2 Stark. 433.†

Where the goods of the bankrupt have been converted by the defendant, either before or after the bankruptcy, the assignees may recover their value in an action of trover. Where there has been a tortious taking since the bankruptcy, such taking is a sufficient conversion; but where there has been a collusive sale of the goods by the trader in contemplation of bankruptcy, there will be no conversion without evidence of a demand and refusal. *Nixon v. Jenkins*, 2 H. B. 135, ante, p. 405. In some cases, although trover will lie, yet it is necessary to bring assumpsit, in order to recover substantial damages. Thus, where after his bankruptcy the bankrupt drew a check in favour of one of his creditors, upon his bankers, who paid the check, it was held that the assignees could not recover the amount of the money in trover against the creditors, but only the value of the paper. *Matthew v. Sherwell*, 2 Taunt. 439, and see *Walker v. Laing*, 7 Taunt. 568.‡ A sheriff who seizes and sells the goods of the bankrupt after an act of bankruptcy committed, is liable in trover, although he had no notice of the act of bankruptcy. *Potter v. Starkie*, cited 4 M. and S. 260.

Evidence in particular actions—as to reputed ownership.] By 6 Geo. IV. c. 16, s. 72, if any bankrupt at the time he becomes bankrupt, shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition, any goods or chattels, whereof he was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition, as owner, the commissioners shall have power to sell the same for the benefit of the creditors.

All personal goods and chattels are within the statute, as ships,

* 2 Eng. Com. Law Reps. 327. † 3 Id. 417. ‡ 2 Id. 221.

Stephens v. Sole, cited 1 Ves. 352, *Ex parte Burn*, 1 Jac. and W. 376; and utensils of trade, *Lingard v. Messiter*, 1 B. and C. 308,^a *Sinclair v. Stephenson*, 2 Bingh. 524,¹ unless such utensils are let, and there is a usage of trade for the utensils to be let, *Horn v. Baker*, 9 East, 215, 239; so stock, *Ex parte Richardson*, Buck. 480; bills of exchange, *Hornblower v. Proud*, 2 B. and A. 327; policies of insurance, *Falkener v. Case*, 3 Br. C. C. 125; shares in a public company, *Nelson v. London Ass. Co.*, 2 S. and S. 292; and in a newspaper, *Longman v. Tripp*, 2 N. R. 67; have been held to be within the statute.

In order to bring the case within the statute the assignees should, in general, give some evidence beyond that of mere possession. Where the bankrupt has once been the owner of the property in question, the mere fact of possession may, it is said, raise a presumption that he continues in possession as reputed owner; but where the bankrupt has never been the real owner, possession may not of itself show him to be reputed owner, and it would then be necessary for the assignees to establish that fact by other evidence. *Lingard v. Messiter*, 1 B. and C. 308.^a Where it appears in evidence that, in some instances, articles used in collieries belong to the tenants, and that in others they do not; that, though in some cases the landlord, in demising collieries, permits the lessee, on certain conditions, to have the use of the fixtures and other things during the demise, yet that in other instances they belong absolutely to the lessee; then if the possession of such things is consistent with the fact of a person being absolute owner, and also of his not being absolute owner, the mere possession of such things ought not to raise an inference in the mind of any cautious person acquainted with the usage that the person in possession is the owner. *Per Abbott, C. J.*, *Storer v. Hunter*, 3 B. and C. 376,^{*} see *Thackthwaite v. Cock*, 3 Taunt. 487, *post*. In order to prove the bankrupt reputed owner, evidence of reputation is admissible, *Oliver v. Bartlett*, 1 B. and B. 269;¹ and, on the other hand, evidence of a contrary reputation is admissible for the defendant. *Gurr. v. Rutton*, Holt. 327.⁼ Thus, evidence of the bankrupt being in possession of furniture, &c., under an agreement which was notorious in the neighbourhood, was held to take the case out of the statute. *Muller v. Moss*, 1 M. and S. 335.

Evidence of reputed ownership "at the time he becomes bankrupt." Goods which have come to the possession of the bankrupt after the act of bankruptcy, are not within the statute. *Lyon v. Weldon*, 2 Bingh. 334.^{*} So if the goods are taken out of the possession of the bankrupt, before the act of bankruptcy, they will not pass to the assignees. Thus where the purchaser of goods lying at a wharf received a delivery order from the seller, but suffered them to remain in the name of the seller for several months,

^a 8 Eng. Com. Law Reps. 83. ¹ 9 Id. 505. ^{*} 10 Id. 117. ¹ 5 Id. 81.
⁼ 3 Id. 121. ⁼ 9 Id. 424.

during which time the seller disposed of a part, till, upon notice of the seller's insolvency, the purchaser had the goods transferred into his own name nine days before the seller's bankruptcy, it was held that the goods did not pass under the statute. *Jones v. Dwyer*, 15 East, 21. So where the purchaser took possession the day before the bankruptcy. *Arboun v. Williams, R. and M.* 72; but see *Darby v. Smith*, 8 T. R. 82, 15 East, 26. But a removal on the same day, but before the act of bankruptcy, will not take the case out of the statute. *Arboun v. Williams, R. and M.* 72.

Evidence of reputed ownership—"by consent and permission of the true owner."] The property of infants, who cannot consent, is not within the statute. *Viner v. Cadell*, 3 Esp. 88. So stock, transferred by the accountant general into the name of the mortgagor, without the privity of the mortgagee, will not pass. *Ex parte Richardson, Buck*, 480. But where a trustee sold and let the purchaser into possession before payment, the case was held to be within the statute, for by the "true owner," the legal owner is intended. *Ex parte Dale, Buck*, 365.

Evidence of reputed ownership—"have in his possession, order, or disposition."] Where a warrant was directed to a trader's servant and another person, as special bailiffs, who took possession of the goods in the shop, but the business, without the trader's interference, was carried on apparently as usual, it was held that the possession of the servant was the possession of the master, and that the case was within the statute. *Jackson v. Irvin*, 2 Campb. 48. *Toussaint v. Hartop, Holt* 335; and see *Doker v. Hasler*, 2 Bing. 479. Where a trader gave a creditor an order to receive a certain sum of money in the hands of A., whom he directed to transmit it to the creditor, and whilst the money was in the hands of the carrier the trader became bankrupt, Lord Ellenborough was of opinion, that while the money was in the hands of the carrier the property remained unaltered, and that the case was within the statute. *Hervey v. Liddiard*, 1 Stark. 123. But the possession of a pawnee is not the possession of the bankrupt pawnor, so as to bring the goods pawned within the statute. *Greening v. Clerk*, 4 B. and C. 316. Where the goods were by agreement left in the vendor's possession, but the purchaser marked them with his initials, they were held to be within the statute, *Knowles v. Horsfall*, 5 B. and A. 134; *Lingard v. Messiter*, 1 B. and C. 308; but, where wine sold by the bankrupt was, for the purchaser's convenience, bottled and deposited in the bankrupt's cellar, set apart in a particular bin, marked with the purchaser's seal, and entered in the bankrupt's books as belonging to the purchaser, it was held not to be within the statute. *Ex parte Marrable*, 1 G. and J. 402. Car-

• 3 Eng. Com. Law Reps. 122. • 9 Id. 488. • 2 Id. 323. • 10 Id. 341.
• 7 Id. 46. • 8 Id. 63.

ruthers v. Payne, 5 Bingham 270.* So where A. deposited with B. as a security, certain warrants of the West-India Dock Company for sugars deposited in their warehouses, and entered in his name in their books, and the company assented to the transfer, and A. afterwards became bankrupt, it was held that the sugars did not pass to A.'s assignees, as the transfer of the warrants was a complete transfer of the possession before the bankruptcy. *Lucas v. Dorrien*, 1 B. Moore, 29.† If a symbolical delivery only can be made, it is sufficient to take the case out of the statute. *Manton v. Moore*, 7 T. R. 67. *Mair v. Glennie*, 4 M. and S. 240. *Brown v. Heathcote*, 1 Atk. 160. Where a person entitled to take out letters of administration neglected to do so, but remained in possession of the goods of the intestate, and became bankrupt, the case was held within the statute. *Fox v. Fisher*, 3 B. and A. 135.‡ Where A., a dyer, having purchased a plant of B., resold it to him, and B. never took actual possession, but demised it to A. for three years, during which time A. became bankrupt, the plant was held to pass to his assignees. *Bryson v. Wylie*, 1 B. and P. 83 (a). So where a creditor purchased under a bill of sale from the sheriff, certain machinery of his debtor taken in execution at his suit, and having marked them with his initials, demised them to his debtor, it was held, that as the change of ownership was not notorious, the machinery passed to the assignees of the debtor. *Lingard v. Messiter*, 1 B. and C. 308.‡ See *Storer v. Hunter*, 3 B. and C. 368,‡ *Horn v. Baker*, 9 East, 215, *Lingham v. Biggs*, 1 B. and P. 82. Where a testator directed, in case his son should carry on his trade, that his lease and furniture should not be sold, but that his trustees should permit his widow and children to reside in his dwelling-house, and have the use of the furniture, it was held that the furniture did not pass to the assignees of the mother and son, who had carried on the trade. *Ex parte Martin*, 2 Rose, 331. So furniture left to trustees to be enjoyed with a mansion-house, and not to be removed without the leave of the trustees. *Earl of Shaftesbury v. Russell*, 1 B. and C. 666.‡

So where household furniture and stock, in pursuance of an agreement for sale of a dwelling-house, and the household furniture and stock therein, were left in the dwelling-house, in the possession of the seller, for three months after the sale, they were held not to be in his order and disposition on his becoming bankrupt within the three months, the sale being *notorious* in the neighbourhood. *Muller v. Moss*, 1 M. and S. 335.

But where a house was let with a covenant to determine the lease on the lessee committing an act of bankruptcy, and by another deed the furniture of the house was demised subject to a similar covenant, it was held that the furniture passed to the assignees of

* 15 Eng. Com. Law Reps. 447. † 2 Id. 105. ‡ 3 Id. 243. § 8 Id. 83.
 ¶ 10 Id. 117. • 8 Id. 178.

the lessee, who became bankrupt, the jury having found that he was the reputed owner of the furniture. *Hickenbotham v. Groves*, 2 C. and P. 492.*

Where a trader authorized a broker employed by him to distrain, to pay a debt due to him by a third person, and the broker promised such third person to pay him the same, it was held that the assignees could not recover the amount of such debt, although he did not pay it until after commission issued. *Bedford v. Pickering*, 8 C. and P. 90.*

Goods sent upon sale or return to a trader, are within his possession, order and disposition, and pass to his assignees. *Livesay v. Hood*, 2 Campb. 83. And where there was a custom that the purchasers of hops should leave them in the vendor's warehouse for the purposes of sale, undistinguished from his other stock, they were held to pass to his assignees. *Thackthwaite v. Cook*, 8 Taunt. 487; see 5 B. and A. 144,⁴ 3 B. and C. 376;⁵ but where goods sent on sale or return, the trader to return such as he should not approve of, arrived only the day before the trader's bankruptcy, they were held not to pass to his assignees, for he should have been allowed a reasonable time to have selected such goods as he was disposed to retain. *Gibson v. Bray*, 8 Taunt. 76.⁶

Goods belonging to a woman living with the trader as his wife, and asserting herself to be his wife, will pass to his assignees, *Mace v. Cadell*, Cowp. 232; but where, on marriage, goods are vested in trustees for the separate use of the wife, in order to enable her to carry on a separate trade, and the husband to live with her, if he do not intermeddle with them, and there be no fraud, such effects will not pass to the assignees of the husband; but whether the trade be carried on solely by the wife, or jointly with the husband, is a question of fact for the jury; and if they determine the latter, the effects will pass to the assignees. *Jarman v. Woollaton*, 3 T. R. 618. See also *Dean v. Brown*, 5 B. and C. 336.⁷

It was held in one case that the share of a dormant partner is not within the statute, the ostensible partner having become bankrupt, *Coldwell v. Gregory*, 1 Price, 119; but this case has been much doubted, *Ex Parte Dyster*, 2 Rose, 256, and may be considered as overruled by the following decision. A. and B. were partners, but the whole business was carried on by, and in the name of A., B. not appearing to the world as a partner. At the dissolution of the partnership, all the joint stock and effects, by agreement, were left in the hands of A., who was to receive and pay all the debts due to and from the concern. After carrying on the business for a year and a half, A. became bankrupt. It was held that the partnership property passed to his assignees. *Ex parte Enderby*, 2 B. and C. 389,⁸ 406; and see *Ex parte Barrow*, 2 Rose, 252.

* 12 Eng. Com. Law Reps. 229. ⁴ 14 Id. 219. ⁵ 7 Id. 48. ⁶ 10 Id. 117.

⁷ 4 Id. 23. ⁸ 7 Id. 248. ⁹ 9 Id. 122.

A ship registered in the name of one partner, but suffered to be in the possession, order, and disposition of the partnership, will pass under the assignment of the joint estate. *Ex parte Burn*, 1 J. and W. 373. Upon the sale or mortgage of a ship at sea, the transfer being symbolical by delivery of the grand bill of sale, upon the return of the ship, the transfer will be invalid if the purchaser, after notice, neglect to take possession, or notify the transfer to the captain. *Mair v. Glennie*, 4 M. and S. 240. *Richardson v. Campbell*, 5 B. and A. 196.¹

And by 4 Geo. IV. c. 41, s. 44, where any transfer of any ship or vessel, or any share thereof, shall have been made as a security for the payment of any debt, either by way of mortgage, or of any assignment to a trustee, for the purpose of selling for the payment of any debt, if such transfer shall have been duly registered according to the provisions of the act, the interest of the mortgagee shall not be affected by the bankruptcy of the mortgagor, notwithstanding that the ship was at the time in the possession, order, and disposition of the bankrupt, and that he was reputed owner. See *Robinson v. Macdowell*, 5 M. and S. 228. *Kirby v. Hodgson*, 1 B. and C. 588.²

Evidence of reputed ownership—in the bankrupt's possession as executor.] Goods of a testator or intestate, in the possession of the bankrupt, as executor or administrator, are not within the statute. *Ex parte Ellis*, 1 Atk. 101, 4 T. R. 629. So where the wife of the bankrupt is executrix. *Viner v. Cadell*, 3 Esp. 88. And even money, if it can be specifically distinguished, will not pass to the assignees. Per Lord Mansfield, 3 Burr. 1369, 3 M. and S. 578. See *Fox v. Fisher*, 3 B. and A. 135.³

Evidence of reputed ownership—in the bankrupt's possession as factor.] Goods in the bankrupt's possession as factor will not pass to his assignees. B. N. P. 42. Per Lord Mansfield, *Mace v. Cadell*, Cowp. 233. If the factor has sold the goods and received the proceeds before the bankruptcy, the principal must come in with the rest of the creditors and prove, *Scott v. Surman*, Willes, 400; but if the factor takes notes in payment, *ibid.*, or exchanges the original goods for other goods, *Whitecombe v. Jacob*, 1 Salk. 160, the notes or goods are the property of the principal, and do not pass to the assignees, see *Taylor v. Plumer*, 3 M. and S. 562; and if the goods have been sold, and the price has not been paid before the bankruptcy of the factor, and the assignees receive the money, the principal may sue them. *Scott v. Surman*, Willes, 400.

Evidence of reputed ownership—in the bankrupt's possession for a particular purpose.] Where goods are in the bankrupt's posses-

¹ 7 Eng. Com. Law Reps. 66. ² 8 Id. 154. ³ 5 Id. 243.

sion for a particular purpose, they do not pass under the statute to his assignees. Thus bills deposited by a customer with his banker, and entered as cash (whether indorsed by the customer or not), for the purpose of obtaining payment, which, by the London bankers, are usually entered short (that is, not carried to the customer's credit as cash till paid), do not pass to the assignees of the banker on his becoming bankrupt. *Giles v. Perkins*, 9 East, 12. *Ex parte Sergeant*, 1 Rose, 153. A customer was in the habit of indorsing, and paying into his banker's hands, bills not due, which, if approved, were immediately entered (as bills) to his credit, to the full amount, and he was then at liberty to draw for that amount by checks on the bank. The customer was charged interest upon all cash payments to him from the time when made, and upon all payments by bills from the time when they were due and paid, and had credit for interest upon cash paid into the bank from the time of the payment, and upon bills paid in from the time when the amount of them was received. The bankers paid away such bills to their customers as they thought fit. The bankers having become bankrupt, it was held that the bills paid in by the customer, and remaining in specie in the banker's hands, did not pass to the assignees, the cash balance, independently of the bills, being in favour of the customer at the time of the bankruptcy. *Thompson v. Giles*, 2 B. and C. 422.* But where bills are not remitted for a particular purpose, but to be discounted, and they are discounted accordingly, they pass to the assignees. *Carstairs v. Bates*, 3 Campb. 301, 2 B. and C. 432.* So where bills are sent by one trader to another trader, on a general running account, *Bent v. Puller*, 5 P. R. 494; or where there is an exchange of bills for bills. *Hornblower v. Proud*, 2 B. and A. 327; see *Parke v. Eliason*, 1 East, 554.

A. and B. agreed that B. should purchase of A. the light gold coin which he should send, at a stated price, and that A. should from time to time draw upon B. for the money due upon such sale, and that B. should also from time to time accept other bills drawn by A. for his own convenience, for which A. was to remit value: after they had acted under this contract for some time, B. became a bankrupt, being under acceptances to a large amount; and A., not knowing of the bankruptcy, sent a quantity of light gold and bills, to enable B. to discharge the acceptances, which parcel was taken by B.'s assignees. It was held that A., who had since paid B.'s acceptances, might recover back the gold and bills sent after B.'s bankruptcy, on the ground that they were sent for the particular purpose of paying those acceptances, and that, as the purpose was not answered, the property in the gold, &c. remained in A., for whom B. should be considered as the factor or

banker. *Tooke v. Hollingsworth*, 5 T. R. 215, 2 H. Bl. 501, S. C.

Where A. having agreed to lend B. 200*l.* to be applied to a specific purpose, drew a check on his banker for that sum, and delivered it to B., who afterwards became bankrupt, and B. not having used the check returned it to A. after having committed an act of bankruptcy, it was held that B.'s assignees could not maintain trover for the check. *Moore v. Barthrop*, 1 B. and C. 5.* And where A. advanced money to B., then lying in prison, for the purpose of settling with his creditors, and the purpose failing, part of such money was repaid to A. by B., who became bankrupt by lying two months in prison, it was held that the assignees could not recover the money so repaid. *Toovey v. Milne*, 2 B. and A. 683. If money received by an overseer of the poor be kept apart from his general property, it will not pass to his assignees. *R. v. Eggington*, 1 T. R. 370.

Evidence of reputed ownership—in the bankrupt's possession as trustee.] Property which is in the bankrupt's hands as trustee only, will not pass under the assignment to his assignees. *Winck v. Keeley*, 1 T. R. 619. *Smith v. Pickering, Peake*, 50. *Taylor v. Plumer*, 3 M. and S. 576.

Defence.

The defendant may either controvert the title of the plaintiffs as assignees, or the cause of action. He cannot, however, dispute the bankruptcy, i. e. the petitioning creditor's debt, the trading, and the act of bankruptcy, where the bankrupt, being within the realm, has not, within two months after the adjudication, given notice of his intention to dispute the commission, provided the action be for a debt or demand, for which the bankrupt might have sustained an action, *ante*, p. 413. And in all cases in which the defendant intends to dispute the bankruptcy, he must give notice of the matters which he intends to dispute, *ante*, p. 414. Where it is competent to the defendant to dispute the bankruptcy, and such notice has been given, but the bankrupt himself has given no notice, the defendant cannot take advantage of the want of a proper petitioning creditor's debt, or of the imperfect evidence of the trading, or of the act of bankruptcy, *ante*, 414. He may show that the act of bankruptcy was a concerted one; but it has been held to be no defence to show that the commission issued by the desire and at the request of the bankrupt. *Shaw v. Williams, R. and M.* 19. Though a different rule prevails in bankruptcy. *Ex parte Grant*. 1 G. and J. 17, *Eden*, 14.

* 8 Eng. Com. Law Reps. 5.

In proof that the act of bankruptcy was fraudulent, the defendant may give in evidence declarations of the bankrupt before his bankruptcy, "that he did not owe 10*l.* to any one," and an inquiry "whether a friendly commission could not be issued?" *Thompson v. Bridges*, 2 B. Moore, 376.*

Admitting the bankruptcy, the defendant may show that the property claimed did not in fact pass to the assignees under the assignment; as for instance, that though claimed as property in the possession of the bankrupt as reputed owner, it was in fact in his possession as trustee or factor. *Vide supra*.

What payments to and by, and transactions with the bankrupt, are good.] The defendant may protect himself by insisting that he comes within the clauses of the bankrupt act by which, in various cases, transactions with the bankrupt, without notice of his bankruptcy, are declared good.

By 6 Geo. IV. c. 16, s. 81, all conveyances by, and all contracts and other dealings and transactions, by and with any bankrupt, *bonâ fide* made and entered into *more than two calendar months* before the date and issuing of the commission against him, and all executions and attachments against the lands and tenements, or goods and chattels of such bankrupt, *bonâ fide* executed, or levied, more than two calendar months before the issuing of such commission, shall be valid, notwithstanding any prior act of bankruptcy by him committed, provided the person or persons so dealing with such bankrupt, or at whose suit, or on whose account such execution or attachment shall have issued, had not, at the time of such conveyance, contract, dealing, or transaction, or at the time of executing or levying such execution or attachment, notice of any prior act of bankruptcy by him committed; provided also that where a commission has been superseded, if any other commission shall issue against any person or persons comprised in such first commission, within two calendar months next after it shall have been superseded, no such conveyance, &c. shall be valid, unless made, &c. more than two calendar months before the issuing of the first commission. See *Tucker v. Barrow*, 1 M. and M. 137.

On a commission issuing on May 14th, a dealing on March 14th is valid, as "more than two calendar months before the issuing of the commission." *Cowie v. Harris*, 1 M. and M. 141.

By section 82, all payments really and *bonâ fide* made, or which shall hereafter be made, by any bankrupt, or by any person on his behalf, before the date and issuing of the commission against such bankrupt (such payment not being a fraudulent preference of such creditor), shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and all payments really and *bonâ fide* made, or which shall hereafter be made to any bank-

rupt before the date and issuing of the commission against such bankrupt, shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and such creditor shall not be liable to refund the same to the assignees of such bankrupt, provided the person so dealing with the said bankrupt had not at time of such payment by or to such bankrupt, notice of any act of bankruptcy by such bankrupt committed.

It is not necessary that the payment should be of a precedent debt to bring the case within the statute. Thus where A. purchased of B., a hop-merchant, a library, and paid him the value, B. at that time having committed an act of bankruptcy of which A. had no notice, it was held that B. was protected by the above clause. *Hill v. Farnell*, 9 B. and C. 45.* See also *Churchill v. Crease*, 5 Bingham. 177.* *Bishop v. Hornblower*, 3 B. and C. 415.* A payment by a partner who has committed an act of bankruptcy, of a partnership debt due before the bankruptcy, to a creditor who has notice of the act of bankruptcy, is not protected by this statute. *Craven v. Edmondson*, 6 Bingham. 734.*

Though notice of a docket may not of itself be esteemed notice of an act of bankruptcy, yet connecting such a notice with the circumstance of the defendants' requiring security before they made the payment, a jury will be justified in finding the fact of notice. *Spratt v. Hobhouse*, 4 Bingham. 181.*

By section 83, the issuing of a commission shall be deemed notice of a prior act of bankruptcy (if an act of bankruptcy had been actually committed before the issuing of the commission), if the adjudication of the person or persons against whom such commission has issued shall have been notified in the London Gazette, and the person or persons to be affected by such notice may reasonably be presumed to have seen the same.

By section 84, no person, or body corporate, or public company, having in his or their possession, or custody, any money, goods, wares, merchandizes, or effects, belonging to any bankrupt, shall be endangered by reason of the payment or delivery thereof to the bankrupt, or his order, provided such person or company had not, at the time of such delivery or payment, notice that such bankrupt had committed an act of bankruptcy.

By section 85, if any accredited agent of any body corporate, or public company, shall have notice of any act of bankruptcy, such body corporate, or company, shall be thereby deemed to have had such notice.

By section 86, no purchase from any bankrupt, *bonâ fide*, and for valuable consideration, where the purchaser had notice, at the time of such purchase, of an act of bankruptcy by such bankrupt committed, shall be impeached by reason thereof, unless the com-

* 17 Eng. Com. Law Reps. 330. * 15 Id. 409. * 10 Id. 136. * 19 Id. 219.

* 13 Id. 395.

mission against such bankrupt shall have been sued out within twelve calendar months after such act of bankruptcy.

Evidence of set-off.] The section of the new bankrupt act relative to set-off has been already given. *Ante*, p. 252. The term *mutual credit* is held to have a more extensive meaning than *mutual debt*. *Ex parte Prescott*, 1 *Atk.* 230. A mutual credit may be constituted, though the parties did not mean particularly to trust each other, as where a bill of exchange, accepted by A., gets into the hands of B., and B. buys goods of A., it is a mutual credit between A. and B., though A. did not know that the bill was in B.'s hands. *Hankey v. Smith*, 3 *T. R.* 507 (n).

Where a partner in the house of M. and Co., bankers, drew bills for the accommodation of A., a customer of M. and Co., who discounted the bill for A., and N. and Co., to whom it was indorsed by M. and Co., discounted the bill for them; and on the bill becoming due after the bankruptcy of M. and Co.; in consequence of the nonpayment of the bill by A., N. and Co. paid themselves the amount of the bill out of the funds of M. and Co. in their hands; it was held to be a case of mutual credit between A. and M. and Co., and that the former might set off a debt due to him by M. and Co. in an action brought by their assignees on the bill. *Bolland v. Nash*, 8 *B. and C.* 105.*

It is now settled that the term *mutual credit* is confined to such credits only, as must, in their nature, *terminate in debts*; as where a debt is due by one party, and credit given him on the other side for a sum of money, payable on a future day, and which will then become a debt; or where there is a delivery of property on one side with directions to turn it into money on the other; in such case the credit given by the delivery of the property must in its nature terminate in a debt, the balance will be taken on the two debts, and the words of the statute will, in all respects, be complied with; but where there is a mere deposit of property, without any authority to turn it into money, no debt can arise out of it, and, therefore, it is not a credit within the meaning of the statute. *Rose v. Hart*, 8 *Taunt.* 499, *Eden*, 193; and see *Fasum v. Cato*, 5 *B. and A.* 861.† Therefore a guarantee against contingent damages, which cannot terminate in a debt, is not the subject of a mutual credit. *Sampson v. Burton*, 2 *B. and B.* 89.‡ It seems that these decisions are to be considered as authorities upon the new bankrupt act, though the words are, that "one debt, or demand, may be set off against another." *Eden*, 194.

Evidence of set-off—nature of the debt due from the bankrupt to

* 15 Eng. Com. Law Repts. 157. † 4 Id. 185. ‡ 7 Id. 282. § 6 Id. 28.

the creditor.] Although it is enacted by 6 Geo. IV. c. 16, s. 16, *ante*, p. 252, that every debt, or demand, thereby made proveable against the estate of the bankrupt may also be set off, yet the debtor of the bankrupt cannot, by procuring a debt due from the bankrupt to be assigned to him after the bankruptcy, entitle himself to set off such debt. Thus where a holder of a promissory note of the bankrupt indorsed it, after a commission issued, to a debtor of the bankrupt's estate, it was held that it could not be set off by the indorsee. *Marsh v. Chambers*, 2 Str. 1234. *Ex parte Hale*, 3 Ves. 304. If the set-off arises on the indorsement of a bill to the defendant, he must show that the indorsement was made before the bankruptcy; *Lucas v. Marsh, Barnes*, 453; but where the set-off was founded on certain notes of the bankrupt, proof that notes of the bankrupt to the amount of the set-off came to the defendant's hands three or four weeks before the bankruptcy, was held sufficient evidence from which the jury might infer that he was in possession of them at the time of the bankruptcy, without identifying them with the notes produced. *Moore v. Wright*, 2 Marsh. 209, 6 Taunt. 517, S. C. The defendant cannot set off cash notes of the bankrupt, payable to J. S. or bearer, without showing that they came to his hands before the bankruptcy, though they bear date before that time. *Dickson v. Evans*, 6 T. R. 57. It is not sufficient, in order to establish a set-off, to prove that the defendant's demand has been allowed by the commissioners as a debt. *Pirie v. Memmet*, 3 Campb. 279. The 6 Geo. IV. c. 16 having made all debts which it has declared to be proveable to be also the subject of set-off, it follows, that in all those cases in which set-off has been refused on the ground of the claim depending upon a contingency, such claim may now be set off. *Eden*, 203.

A person who receives a banker's notes after he knows that he has stopped payment, but without knowing that he had committed an act of bankruptcy, is entitled to set off the amount. *Hawkins v. Whitten*, 10 B. and C. 217.

Evidence of set-off—nature of the debt due from the creditor to the bankrupt.] With regard to the nature of the debt due from the creditor to the bankrupt, or the credit given by the bankrupt to the creditor, it must appear that the debt, or the credit, existed before the bankruptcy. Thus, if the holder of an acceptance buy goods from the acceptor, and the acceptor becomes bankrupt, the purchaser may set off the acceptance against the price of the goods. *Hankey v. Smith*, 2 T. R. 507 (n). Where A. bought of B. goods to the amount of 430*l.* at six months credit, and afterwards to the amount of 230*l.* at the same credit, and at the expiration of the first six months gave B. two bills of exchange, upon

third persons for 600*l.*, B. giving A. an undertaking to repay him the balance of 170*l.* upon the bills being paid, it was held, the bills being paid, and A. becoming bankrupt before the credit for the second parcel expired, that B. might set off the 170*l.* against the price of the second parcel. *Atkinson v. Elliott*, 7 T. R. 378. But where a bankrupt, previously to his bankruptcy, deposited a bill of exchange with the defendant, for the purpose of raising money thereon, and an advance was accordingly made, it was held that the assignees of the bankrupt were entitled to recover the bill on tendering the money advanced, though a balance remained due to the defendant on a general account. *Key v. Flint*, 1 B. Moore, 451, 8 Taunt. 21,* S. C. And where bankers had accepted bills for the accommodation of a trader, who after committing an act of bankruptcy, but before a commission sued out, lodged money with them to take out the bills, which, when due, were paid by the bankers, it was held that the bankers were bound to refund this money to the assignees, and could not set it off, for the 5 Geo. II. c. 30, was confined to mutual credits, and mutual debts, "at any time before such person became bankrupt;" *Camplin v. Diggins*, 2 Campb. 312; but now, by the new act, the debt is a subject of set-off, notwithstanding a prior act of bankruptcy, provided the defendant had no notice of such act.

The debt, or credit, must be due in the same right, as in every case of set-off. *Vide supra*. Where third persons holding the acceptance of a trader who was known to be in bad circumstances, agreed with the defendants, as a mode of covering the amount of the bill, that it should be indorsed to them, and that they should purchase goods of the trader, which were to be paid for by a bill at three months date, or made equal to cash in three months (before which time the trader's acceptance would be due), but without communicating to the trader that they were the holders of his acceptance, it was held that the trader having become bankrupt, the defendants could not set off the amount of his acceptance, which they did not hold in their own right, but, in effect, as trustees for the other persons. *Fair v. M'Iver*, 16 East, 130. But where the defendant, who had ordered goods for ready money, paid for them by returning to the vendor's agent a bill accepted by the vendor, which had been due and dishonoured before the goods were ordered, and the agent carried it home to the vendor, who kept it, and became bankrupt, the transaction was held equivalent to payment. *Mayer v. Nias*, 1 Bingh. 311.*

Competency of Witnesses.

Bankrupt.] It is now a well-established rule (though the principle of it has been doubted, see 2 Phill. Ev. 335, 2 B. and C. 18,* M'Cl. and Y. 402), that a bankrupt, even after obtaining his certi-

* 4 Eng. Com. Law Reps. 3. * 8 Id. 330. * 9 Id. 9.

ficate, and releasing his share of the surplus, is incompetent to prove any fact necessary to support the commission. He cannot, therefore, be called to prove the petitioning creditor's debt, *Chapman v. Gardiner*, 2 H. Bl. 279, *Cross v. Fox*, *ib.* (n); or to prove his own act of bankruptcy, *Field v. Curtis*, 2 Str. 829; or to disprove it, as where he was asked whether the assignment did, or did not, comprise the whole of his property, *Hoffman v. Pitt*, 5 Esp. 24, though, in a prior case, Lord Kenyon admitted the bankrupt, to prove whether the arrest, which was said to be fraudulent, and an act of bankruptcy, was, in fact, a concerted or an adverse arrest. *Oxlade v. Perchard*, 1 Esp. 286. In a subsequent case, however, Mansfield, C. J., rejected the evidence of a bankrupt to disprove his bankruptcy, and said that *Oxlade v. Perchard*, which was cited, had been overruled by Lord Ellenborough and himself at Guildhall. *Rabett v. Gurney*, 1 Mont. B. L. 482 (n), ed. 1805, M^cCl. and Y. 404. Nor can a bankrupt be called to prove a prior act of bankruptcy; *Wyatt v. Wilkinson*, 5 Esp. 187; and when called by the other side he cannot be cross-examined as to any fact, necessary either to support the commission, *Elsom v. Braily*, 1 Scho. N. P. 258, *Wyatt v. Wilkinson*, 5 Esp. 187; but see *Fletcher v. Woodmas*, 1 Scho. N. P. 253 (n), or tending to defeat it: *Binns v. Telley*, M^cCl. and Y. 397.

A bankrupt is not a competent witness to increase his estate, for his right to an allowance (depending on the dividends), and to the surplus, excludes him on the ground of interest. *B. N. P. 43*. *Buller v. Cooke*, *Cowp.* 70. But if the bankrupt has obtained his certificate, and has released his share in the surplus, and in the dividends, to his assignees, or has executed a general release to them, he is thereby rendered competent to increase the estate. *B. N. P. 43*, *Nares v. Saxby*, cited 2 T. R. 497; and see *Cartisle v. Eady*, 1 C. and P. 234.* In an action on the statute, 9 Anne, c. 14, by the assignee of a bankrupt, to recover money lost by the bankrupt at play, it was held that the bankrupt, who had obtained his certificate, was rendered a competent witness to prove the loss by three releases: 1. By the bankrupt to the assignee. 2. By all the creditors to the bankrupt; and 3. By the assignee, who was not a creditor, to the bankrupt: and it was also held, that a year after the commission issued, it might be presumed that all the creditors had proved, and that a release signed by all who had proved might therefore be considered as a release by all the creditors. *Carter v. Abbott*, 1 B. and C. 444.⁴ Where the witness has been twice bankrupt, his certificate under the second commission, and a release to the assignees, will not make him a competent witness to increase the fund, unless he has paid 15s. under the second commis-

* 11 Eng. Com. Law Reps. 378. ⁴ 8 Id. 194.

sion, for unless he pays that sum his future effects remain liable. *Kennet v. Greenwallers, Peake*, 3. In a suit against the crown, a release from the bankrupt to his assignees will not operate to make him a competent witness, the crown not being bound by the bankrupt law. *Crawford v. Attorney General*, 7 Price, 2.

A bankrupt may, however, be called to *diminish* the fund, though not certificated. *Butler v. Cooke, Coup.* 70, B. N. P. 43. Where one of several defendants pleads his bankruptcy, and a *nolle prosequi* has been entered as to him, he is a competent witness for the other defendants, *ante*, p. 88.

So the bankrupt may be called to prove any fact except such as are material to support the commission, or to increase the estate, having obtained his certificate and released his surplus. He may, therefore, be called to prove the handwriting of the commissioners in order to identify the proceedings. *Morgan v. Pryor*, 2 B. and C. 14. So Raymond, C. J., admitted a bankrupt to give evidence as to the time of an act of bankruptcy, though he refused him as a witness to prove the act. 12 Vin. Ab. 11, pl. 28.

In an action by the assignees against a creditor who has levied under an execution against the bankrupt, the latter was held to be competent to prove the defendant's knowledge of his insolvency. *Reed v. James*, 1 Stark. 134. But in such case it seems that the bankrupt must be certificated and have released to his assignees, as his evidence goes to increase the estate. See 2 Phill. Ev. 336 (a).

The bankrupt's wife cannot be examined as to an act of bankruptcy committed by her husband. *Ex parte James*, 1 P. Wms. 611, 12 Vin. Ab. 11, pl. 28. Where the wife was called to prove that a promissory note had been paid to the defendants in contemplation of bankruptcy, Lord Kenyon held her to be a competent witness, inasmuch as if the plaintiff recovered, the defendants would be creditors against the estate to the amount of the note, and so the witness stood indifferent. *Jourdain v. Lefevre*, 1 Esp. 66. But it has been observed, that in this case the witness appears to have been interested, inasmuch as the fund would be increased if the plaintiff succeeded, by the difference between the amount of the note and a dividend on a debt to the same amount, unless the estate should pay 20s. in the pound. *Eden*, 362.

Creditor.] A creditor is not a competent witness to increase the fund out of which he is to receive his dividends, and therefore he cannot be called to prove gaming by the bankrupt, and so to deprive him of his allowance. *Shuttleworth v. Bravo*, 1 Str. 507. Nor is a creditor a competent witness to support the commission which is to be considered as a benefit to the witness, since it brings a divisible fund within his reach. *Crooke v. Edwards*, 2 Stark. 302.

Adams v. Malkin, 3 Campb. 543; but see *Williams v. Stevens*, 2 Campb. 301; *contra*. And it is immaterial that he has not proved. *Adams v. Malkin*, 3 Campb. 543; *Crooke v. Edwards*, 2 Stark. 302,^a overruling *Williams v. Stevens*, 2 Campb. 301. But a creditor is competent to overthrow the petitioning creditor's debt. *In re Codd*, 2 Sch. and Lef. 116. And where the bankrupt is a member of parliament who has committed an act of bankruptcy by not paying, securing, or compounding for his debt, a creditor is a competent witness, from necessity, to prove that the debt has not been paid, secured, or compounded for, but not to prove other circumstances which can be established *aliunde*. *Ex parte, Harcourt*, 2 Rose, 203. A creditor may be rendered competent by a release to the assignees. *Koores v. Chapman, Peake*, 19; and see *Sinclair v. Stevenson*, 1 C. and P. 582.¹ So if he has sold his debt, or agreed to sell it, for he thereby becomes only a trustee for the assignee of the debt. *Granger v. Furlong*, 2 W. Bl. 1273. *Heath v. Hall*, 4 Taunt. 326.

The petitioning creditor is not a competent witness to show that the commission was regularly sued out. He enters into a bond to the Chancellor, conditioned to establish the several facts upon which the validity of the commission depends, and to cause it to be effectually executed. He has, therefore, a clear and direct interest in the question at issue. *Per Lord Ellenborough, Green v. Jones*, 2 Campb. 411. But he may be called to upset the commission, as by showing that the act of bankruptcy was concerted between himself and the bankrupt, and that there was no sufficient petitioning creditor's debt. *Lloyd v. Stretton*, 1 Stark. 40.² But the deposition of the petitioning creditor is sufficient proof of the debt, where no notice to dispute the bankruptcy has been given under 49 Geo. III, c. 131. *Bisse v. Randall*, 2 Campb. 493.

In an action by a creditor of the bankrupt, against the sheriff for a false return to a writ of *fi. fa.* against the bankrupt's goods, where the defence was that at the time of levy the party was bankrupt, the declarations of the petitioning creditor, made after the commission issued, have been admitted to disprove the existence of a good petitioning creditor's debt. *Young v. Smith*, 6 Esp. 121. *Dowden v. Fowle*, 4 Campb. 38.

Commissioner and assignee.] Where a commissioner was called to support the commission, under which he had acted, on its being objected that he had received fees, and was liable to an action of trespass if the commission should be overturned, Lord Ellenborough observed that he could not be called upon to refund the fees which he had received, and he permitted the witness to be examined, saying that he would not then pronounce upon the question. *Crooke v. Edwards*, 2 Stark. 302.³ His interest in

^a 3 Eng. Com. Law Reps. 355. 11 Id. 480. ² 2 Id. 296.

the future fees, which he might get if the commission were supported, seems not to have been noticed. *Eden*, 365.

An assignee who has released his claim upon the estate is competent to prove the petitioning creditor's debt. *Tomlinson v. Wilkes*, 2 B. and B. 397.¹

ACTIONS AGAINST BANKRUPTS.

IN an action against a bankrupt, he may plead that the cause of action accrued before he became bankrupt, by 6 Geo. IV. c. 16, s. 126.

By that statute any bankrupt who shall, after his certificate shall have been allowed, be arrested, or have any action brought against him for any debt, claim, or demand, by that act made proveable under the commission against such bankrupt, shall be discharged upon common bail, and may plead in general that the cause of action accrued before he became bankrupt, and may give the act and the special matter in evidence, and such bankrupt's certificate, and the allowance thereof, shall be sufficient evidence of the trading, bankruptcy, commission, and other proceedings precedent to the obtaining such certificate. A certificate obtained after the above statute on a commission issued before it, is proved by the production of the certificate duly allowed. *Taylor v. Welsford*, 1 M. and M. 503.

And by section 130, no bankrupt shall be entitled to his certificate, or to be paid any such allowance, and any certificate, if obtained, shall be void, if such bankrupt shall have lost, by any sort of gaming or wagering, in one day 20*l.*, or within one year next preceding his bankruptcy 200*l.*, or if he shall within one year next preceding his bankruptcy have lost 200*l.* by any contract, for the purchase or sale of any government or other stock, where such contract was not to be performed within one week after the contract, or where the stock bought or sold was not actually transferred or delivered, in pursuance of such contract, or shall, after an act of bankruptcy committed, or in contemplation of bankruptcy, have destroyed, altered, mutilated, or falsified, or caused to be destroyed, altered, mutilated, or falsified, any of his books, papers, writings, or securities, or made, or been privy to the making of any false or fraudulent entries in any book of account, or other document, with intent to defraud his creditors, or shall have concealed property to the value of 10*l.* or upwards, or if any person having proved a false debt, under the commission, such bankrupt being privy thereto, or afterwards knowing the same, shall not have disclosed the same to his assignees within one month after such knowledge.

A loss by gaming invalidates a certificate, though the bankrupt

¹ 6 Eng. Com. Law Reps. 168.

on the same day wins more than he loses. *Ex parte Newman, Glynn and J.* 329.

The defence of bankruptcy cannot be given in evidence under the general issue, but must be pleaded in the form prescribed by statute. *Gowland v. Warren*, 1 *Campb.* 363. Under that plea a certificate allowed after the commencement of the suit, but before plea pleaded, may be given in evidence, *Harris v. James*, 9 *East*, 82; but if allowed after plea pleaded, it is inadmissible, *Langmead v. Beard*, cited 9 *East*, 85; but should be pleaded *puis darrein continuance*. The allowance, it has been said, needs no proof, the judges taking cognizance judicially of the handwriting of the Chancellor. *Eden*, 426. The certificate cannot be given in evidence unless entered of record in the manner required by 6 Geo. IV. c. 16, s. 95, 96. *Ibid. supra*. If a commission issue against a person by a wrong name, and he obtains his certificate under it, and an action is afterwards brought against him in his right name, on a plea of bankruptcy, he may show that he is the person against whom the commission issued, and that he has gone by the name by which he is described in the commission. *Stevens v. Elizee*, 3 *Campb.* 256.

Where issue was joined on the fact of a discharge under a former commission, the affidavit of conformity was held to be good secondary evidence of the certificate, after a notice to produce. *Graham v. Grill*, 4 *Campb.* 282. So where to prove that the defendant, who pleaded his bankruptcy, had been before discharged as a bankrupt, a witness stated that he had been employed by the defendant to solicit his certificate, and that looking at the entries in his books he had no doubt that it had been allowed by the Lord Chancellor, it was held sufficient, notice to produce the certificate having been given; but it was ruled that the book in the bankrupt office, containing entries of the allowance of certificates was not sufficient secondary evidence. *Henry v. Leigh*, 3 *Campb.* 499.

Evidence on plea of bankruptcy, what debts barred by certificate.] A certificate under a joint commission may be given in evidence in an action for a separate debt, and *vice versâ*. *Horsey's case*, 3 *P. Wms.* 23, *Ex-parte Yale*, *id.* 24 (n). By the statute any debt, claim, or demand, made proveable under the commission, is discharged by the certificate, but these words do not include a debt due to the crown. *Anon.* 1 *Atk.* 262, *Eden*, 413. Some demands, which are not proveable under the commission, are barred by the certificate. Thus the costs of an action, *ex contractu*, where there is no verdict before the bankruptcy, are not proveable under the commission, but are barred by the certificate. *Ex-parte Hill*, 11 *Ves.* 646, *Ex-parte Poucher*, 1 *G. and J.* 386. So where on the reference of a cause, the arbitrator made his award against the plain-

tiff, who became bankrupt before the costs were taxed, and judgment signed, the costs were held not to be proveable under the commission. *Haswell v. Thorogood*, 7 B. and C. 705.^a A claim for unliquidated damages merely is not proveable under the commission, and is not barred by the certificate, and therefore, where the plaintiff sues the defendant in trespass for seducing his daughter, and judgment is not signed until after the bankruptcy, though the verdict be before it, the certificate is no bar; *Buss v. Gilbert*, 2 M. and S. 70, *Ex parte Charles*, 14 East, 197; and in an action of tort for not selling stock according to orders, bankruptcy and certificate are no defence. *Parker v. Crole*, 5 Bingh. 63.^a Where A. covenants that B. should pay the premium upon a policy of insurance, the non-payment is not proveable under a commission against A., and consequently not barred by his certificate. *Atwood v. Partridge*, 4 Bingh. 209.^a But where a debt exists before the bankruptcy, and a verdict is obtained, and costs are taxed after the bankruptcy, the costs are considered as part of the original debt, and that being barred by the certificate, the costs are barred with it. *Lewis v. Piercy*, 1 H. Bl. 20. Costs even in tort where the bankruptcy is during the term, of which the judgment is signed generally, are barred by the certificate. *Greenway v. Fisher*, 7 B. and C. 436.^a See *Bire v. Moreau*, Bingh. 57.^a Where a debt is contracted in a foreign country, a discharge (as by a certificate,) according to the law of that country, is a bar to an action brought in our own courts, *Ballantine v. Golding*, Co. Bl. 347, 1st ed., *Potter v. Brown*, 5 East, 124; but not so where, by the foreign law, the remedy only is barred, *Williams v. Jones*, 13 East, 439; nor is a foreign bankruptcy and certificate a bar to a demand for a debt contracted in England. *Smith v. Buchanan*, 1 East, 6, see 2 H. Bl. (n), 4th ed.

Evidence on plea of bankruptcy, in answer to plea.] Where the general plea of bankruptcy is pleaded, which concludes to the country, the plaintiff can only reply the *similiter*, *Wilson v. Kemp*, 2 M. and S. 549, *Hughes v. Morley*, 1 B. and A. 22; and under this replication the plaintiff may give in evidence any matters which by 6 Geo. IV. c. 16, s. 130, *ante p.* 453, render the certificate void. *Ibid.*

Evidence of subsequent promise.] By 6 Geo. IV. c. 16, s. 131, no bankrupt after his certificate shall have been allowed under any present or future commission, shall be liable to pay or satisfy any debt, claim, or demand from which he shall have been discharged by virtue of such certificate, or any part of such debt, claim, or demand, upon any contract, promise, or agreement, made or to be made after the suing out of the commission, unless such promise, contract, or agreement, be made in writing, signed by the bank-

^a 14 Eng. Com. Law Reps. 111. ^a 15 Id. 371. ^a 13 Id. 403. ^a 14 Id. 75.
^a 13 Id. 341.

rupt, or by some person thereto lawfully authorized in writing by such bankrupt. The initial of the defendant's surname is not a sufficient signature within this clause. *Hubert v. Moreau*, 2 C. and P. 528.*

ACTIONS AGAINST CONSTABLES AND REVENUE OFFICERS.

By 24 Geo. II. c. 44, s. 6, no action shall be brought against any constable, headborough, or other officer, or against any person or persons acting by his order and in his aid, for any thing done in obedience to any warrant under the hand or seal of any justice of the peace, until demand hath been made or left at the usual place of his abode by the party or parties intending to bring such action, or by his, her, or their attorney or agent, in writing, signed by the party demanding the same, of the perusal and copy of such warrant, and the same has been refused or neglected for the space of six days after such demand; and in case after such demand and compliance therewith, by showing the said warrant to, and permitting a copy to be taken thereof by the party demanding the same, any action shall be brought against any such constable, &c. without making the justice or justices who signed or sealed the said warrant defendant or defendants, that on producing and proving such warrant at the trial of such action, the jury shall give their verdict for the defendant or defendants, notwithstanding any defect of jurisdiction in such justice or justices. And if such action be brought jointly against such justice or justices, and also against such constable, &c. then on proof of such warrant the jury shall find for such constable, &c. notwithstanding such defect of jurisdiction as aforesaid.

What persons are within the statute.] Churchwardens and overseers of the poor taking a distress for poor's rate are entitled to the protection of the statute. *B. N. P. 24, Harper v. Carr*, 7 T. R. 271. So a gaoler who receives and detains a prisoner under the warrant of a magistrate. *Butt v. Newman*, Gow, 97. This section is obviously intended to protect the officer in those cases only where the justice remains liable, and it is necessary in order to bring the officer within it that he should act most strictly in obedience to his warrant. *Per Abbott, C. J. Parton v. Williams*, 3 B. and A. 333.† Therefore, where an officer apprehends a different person from him described in the warrant he is not protected, *Money v. Leach*, 3 Burr. 1742, 2 M. and S. 260. So where a constable having a warrant to search for 100 lbs. weight of cotton copps which had been stolen, and also a tin pan and sieve which were claimed by the party robbed, but were not mentioned in the

* 12 Eng. Com. Law Reps. 248. † 5 Id. 472. ‡ 5 Id. 308.

warrant, nor likely to furnish evidence of the identity of the articles stolen. *Crozier v. Cundy*, 6 B. and C. 232.* So where, not acting in obedience to the warrant, he executes it out of the jurisdiction of the magistrate by whom it is granted. *Milton v. Green*, 5 East, 232. So also where, in executing a warrant of distress, he enters a house and breaks the windows, &c. *Bell v. Oakley*, 2 M. and S. 259. But it will not deprive the officer of the protection of the statute that the warrant was illegal, provided he acted in obedience to it. *Price v. Messenger*, 2 B. and P. 158. Where a statute provides that for any thing done in pursuance of that act, notice shall be given before action commenced, such notice is only necessary in those cases, in which the party against whom the action is brought has reasonable ground to suppose that the thing done by him is done in execution of or under the authority of the act. *Cooke v. Leonard*, 6 B. and C. 361.†

What actions are within the statute.] The act only extends to actions of tort, and therefore where an action for money had and received was brought against an officer who had levied money on a conviction which had been quashed, it was held, that a demand of a copy of the warrant was not necessary. *B. N. P.* 24. Replevin is not an action within the statute. *Fletcher v. Wilkins*, 6 East, 283, 4 B. and C. 211.‡

Evidence of demand.] The demand may be proved by the production of a duplicate original without a notice to produce; *Jory v. Orchard*, 2 B. and P. 39; and it is sufficient if the demand be signed by the plaintiff's attorney. *Ibid.* Where the declaration does not charge the defendants as officers, the plaintiff need not, in the first instance, prove a demand of a copy of the warrant. If the defendants mean to justify under the warrant, that proof lies upon them, and when they come to that part of the case the plaintiff must prove a demand. *Price v. Messenger*, 3 Esp. 96.

If the constable refuse or neglect, for the space of six days, to comply with the demand, the constable may be sued as before the statute. But if he complies with the demand at any time before action brought, though more than six days after the demand, he will be within the protection of the act. *Jones v. Vaughan*, 5 East, 445.

Limitation of action.] By 24 Geo. II. c. 44, s. 8, no action shall be brought against any justice of the peace for any thing done in the execution of his office, or against any constable, head-borough, or other officer or person acting as aforesaid, unless commenced within six calendar months after the act committed. The object of this section differs from that of the sixth section (*vide supra*), being intended for the benefit of persons who intend to act right, but

* 13 Eng. Com. Law Reps. 154. † 13 Id. 195. ‡ 10 Id. 310.

by mistake act wrong. *Per Abbott, C. J., Parton v. Williams, 3 B. and A. 333.*^{*} And the officer is entitled to the protection of this section of the statute, provided he acts *bonâ fide* in his character of officer, and under a belief that he is discharging the duty with which he is invested. *Per Bayley, J., Id. 338.* Therefore, where some constables, under a warrant to search for black cloth which had been stolen, finding no black cloth, took cloth of other colours, and carried it before a magistrate, refusing at the same time to tell the owner of the house searched whether they had any warrant to do so; it was held, that they were within this section of the statute, and that the action ought to have been commenced within six months. *Smith v. Wiltshire, 3 B. and B. 619.*⁷ And so where a constable acting under a warrant, commanding him to take the goods of A., took the goods of B., believing them to belong to A., it was held, that the action must be brought within six months. *Parton v. Williams, 3 B. and A. 330.*^{*} It was ruled by Lord Kenyon, in *Postlethwaite v. Gibson, 3 Esp. 226*, that a constable taking a person into custody on suspicion of felony, without a warrant, was not within the protection of this section; but on this decision being cited, it was said by Abbott, C. J., that if it were necessary to determine this question, he should wish for time to consider it. *Parton v. Williams, 3 B. and A. 334.*^{*} And the opinion of Lord Kenyon has likewise been questioned in another decision. *Smith v. Wiltshire, 2 B. and B. 622.*⁷ Where a constable acts *colore officii*, and not *virtute officii*, he is not protected by the statute; where the act committed is of such a nature that the office gives him no authority to do it, in the doing of that act he is not to be considered as an officer; but where a man doing an act within the limits of his official authority, exercises that authority improperly, or abuses the discretion placed in him, to such cases the statute extends. *Per Id. Kenyon, Alcock v. Andrews, 2 Esp. 542 (n).* *Cooke v. Leonard, 6 B. and C. 351,*^{*} *supra*.

Venue.] By 21 Jac. I. c. 12, s. 5, if any action upon the case, trespass, battery, or false imprisonment, shall be brought against any justice of peace, mayor, or bailiff, of city, or town corporate, headborough, portreve, constable, tithing-man, collector of subsidy or fifteens, churchwardens, and persons called sworn men, executing the office of churchwarden or overseer of the poor, and their deputies, or any of them, or any other which in their aid and assistance, or by their commandment, shall do any thing touching or concerning his or their office or offices, for or concerning any matter, cause, or thing, by them or any of them, done by virtue or reason of their, or any of their office or offices, the said action shall be laid within the county where the trespass or fact shall be done

^{*} 5 Eng. Com. Law Reps. 300. ⁷ 6 Id. 285. ^{*} 13 Id. 195.

and committed, and not elsewhere ; and it shall be lawful to and for all and every person and persons aforesaid, to plead the general issue, and give the special matter in evidence.

A constable who imprisons a person on suspicion of felony, without any reasonable grounds, of his own authority, without warrant, is within this statute ; and a private person, who acts in aid of the constable, is also within it ; but if he acts, not merely in aid, but as a prime mover, and principal (which is a question for the jury,) the statute does not apply to him. *Staight v. Gee*, 2 Stark. 445.* Where the prosecutor, who had obtained the warrant, pointed out the party to the constables, Lord Ellenborough was of opinion that he was acting in their aid within the meaning of the statute. *Nathan v. Cohen*, 3 Campb. 257. But where A. sent for B., a constable, and gave the plaintiff in charge for a felony, Bayley J. ruled that A. was not within the statute, and must plead specially. *McCloughan v. Clayton, Holt*, 478.†

Evidence of arrest.] In actions against constables it sometimes becomes a question whether the evidence is sufficient to establish an arrest. Where the constable went with the warrant to the plaintiff's house and showed it to him, and after some conversation the plaintiff attended the constable to the magistrate, by whom the charge was dismissed, the constable having never touched the plaintiff, it was held that this was no arrest, for that the plaintiff went voluntarily before the magistrate. *Arrowsmith v. Le Mesurier*, 2 N. R. 211. So where the officer told the party that he had a writ against him, to which the latter replied, "Very well, I will come to you immediately," but kept his seat, and on the officer quitting the room made his escape, it was ruled by Abbott C. J. to be no arrest. *Russen v. Lucas, R. and M.* 26. But where the constable said to the plaintiff, "You must go with me," on which the plaintiff said he was ready to go, and went with the constable towards a police office, without being seized or touched, this was ruled to be an imprisonment ; and *per Abbott, C. J.*, "if a person send for a constable, and give another in charge for felony, and the constable tell the party charged that he must go with him, on which the other, in order to prevent the necessity of actual force being used, expresses his readiness to go, and does actually go, this is an imprisonment." *Pocock v. Moore, R. and M.* 32. *Chinn v. Morris*, 2 C. and P. 360.* See more as to arrests, ante, p. 304. The law on this point was thus laid down by Eyre C. J., in *Simpson v. Hill*, 1 Esp. 431, (see 1 M. and R. 215) : "If the constable in consequence of the defendant's charge had for one moment taken possession of the plaintiff's person, it would be in point of law an imprisonment ; as for example, if he had tapped her on the shoulder and said, "You are my prisoner," or if she had submitted herself in-

to his custody, such would be an imprisonment; but the merely giving her in charge, without any taking possession of the person, where nothing more passes than merely the charge, is not by law a false imprisonment." In the following case the circumstances were held to constitute an imprisonment. The plaintiff appeared before the defendant, a magistrate, to answer the complaint of A. for unlawfully selling his dog. The defendant advised the plaintiff to settle the matter, by paying a sum of money, which the plaintiff declined. The defendant then said "he would convict the plaintiff in a penalty under the trespass act, in which case he would go to prison." The plaintiff still declined paying, and said he would appeal. The defendant then called in a constable, and said, "Take this man out, and see if they can settle the matter; and if not bring him in again, as I must proceed to commit him under the act." The plaintiff then went out with the constable, and settled the matter, by paying a sum of money; it was held, that this was an assault and false imprisonment, for which trespass would lie; and which, as no conviction had been drawn up, the defendant could not justify. *Bridget v. Coyney*, 1 M. and R. 211. Where a sheriff's officer having a warrant to arrest A. sent a message to A. to fix a time to call and give a bail bond, and A. fixed a time, attended and gave bail, in an action for malicious arrest, held to be no arrest. *Berry v. Adamson*, 6 B. and C. 528. See ante, p. 304.

Defence.

A constable having reasonable cause to suspect that a felony has been committed, is justified in arresting the party suspected, though it afterwards appear that no felony has been committed. *Beckwith v. Spicer*, 6 B. and C. 635. * *Davis v. Russell*, 5 Bingh. 354.

Actions against Officers of Customs or Excise.

By 28 Geo. III. c. 37, s. 25, no writ or process shall be sued out against any officer of the customs or excise, or against any person or persons, acting by his or their order, in his or their aid, for any thing done in the execution, or by reason of that or any other act or acts of parliament then in force, or thereafter to be made relating to the said revenues, or either of them, until one calendar month next after notice in writing shall have been delivered to him or them, or left at the usual place of his or their abode by the attorney, or agent for the person who intends to sue out such writ, or process, as aforesaid, in which notice shall be clearly and explicitly contained the cause of action, the name and place of abode of the person or persons in whose name such action is intended to be brought, and the name and place of abode of the said

* 13 Eng. Com. Law Reps. 245. * 13 Id. 287. * 15 Id. 463.

attorney or agent. By sec. 27, the plaintiff shall not give evidence of any cause of action not contained in the notice.

Under the prior act, 23 Geo. III. c. 70, s. 30, it was held that an excise officer was protected by this statute for an act not warranted by his official capacity if done, *bonâ fide*, in the supposed execution of his duty, such as assaulting an innocent person whom he suspected to be a smuggler. *Daniel v. Wilson*, 5 T. R. 1. But a constable, who seized a person by direction of a custom-house officer, who had himself no power to seize, was held not to be within the protection of the act. *Norton v. Miller*, 2 Chitty, 140. And where a revenue officer seizes goods as forfeited, which are not liable to seizure, and takes money to release them, an action for money had and received will lie to recover it back without a month's notice. *Irving v. Wilson*, 4 T. R. 485, 2 B. and C. 737,^a 4 B. and C. 211.^b The intent of the notice is, that the defendant may know where to find the plaintiff, in order to tender him amends on the receipt of the notice. *Per Lawrence, J., Williams v. Burgess*, 3 Taunt. 129. A description of the plaintiffs in the notice as, "*late of Rotherhithe, in the county of Surrey*," has been held sufficient. *Wood v. Folliott*, 4 B. and P. 552 (n).

Limitation of action.] If any action or suit shall be brought or commenced against any person or persons, for any thing by him or them done, in pursuance of that or any other act or acts of parliament then in force, or thereafter to be made, relating to his majesty's revenues of customs and excise, such action, or suit, shall be commenced within three months next after the matter or thing done. 28 Geo. III. c. 27, s. 23. Under this section the action must be commenced within three lunar months. *Croker v. M'Tavish*, 1 Bingham, 307.^c

The defendant may plead the general issue, and give the special matter in evidence. 23 Geo. III. c. 70, s. 33, 24 Geo. III. sess. 2, c. 47, s. 35.

ACTIONS BY EXECUTORS AND ADMINISTRATORS.

WHERE an action is brought by an executor or administrator, in his representative capacity, he must first (unless it be admitted on the pleadings) prove himself to be executor or administrator, and then establish the cause of action, as in other suits.

Evidence of title, as executor or administrator, where necessary.] Where the plaintiff declares as executor or administrator, upon a cause of action arising in the time of his testator or intestate, and makes *profert* of the probate or letters of administration, the de-

^a 18 Eng. Com. Law Reps. 279. ^b 9 Id. 232. ^c 10 Id. 310. ^d 8 Id. 329.

defendant cannot, under the general issue, deny the title of the plaintiff as executor or administrator. Thus in an action of assumpsit by an administrator, on promises to the intestate, the plea of *non assumpsit* admits the title of the plaintiff as administrator, and the defendant will not be allowed to insist on the production of the letters of administration, or to object that they are not duly stamped, *Thynne v. Prothero*, 2 M. and S. 553, nor that the supposed intestate has made a will and appointed an executor. *Marsfield v. Marsh*, 2 Ld. Raym. 824. So in an action of trover by an administrator, on the possession of his intestate, if the defendant pleads the general issue, he will not be allowed to controvert the title of the plaintiff as administrator. *Ibid.* The plea of the general issue, however, only admits the title stated in the declaration, and, therefore, if that title be insufficient, the plaintiff cannot recover. Thus in an action by an administrator, on a judgment recovered by his intestate in the King's Bench, at Westminster (which is *bonum notabile* in Middlesex), where the plaintiff made *profert* of letters of administration from the archdeacon of Dorset, and the defendant pleaded a plea which admitted the letters of administration, it was held on motion in arrest of judgment, that in order to enable the plaintiff to recover, he ought to have had letters of administration from the Bishop of London, and that the plea only admitted the plaintiff's title as stated, which was an insufficient title. *Adams v. terretenants of Savage*, 6 Mod. 134.

Where the plaintiff declares upon a cause of action arising in the time of his testator, or intestate, and the defendant wishes to controvert his title as executor or administrator, he must do so by plea; where the plaintiff alleged in the declaration that administration of all and singular the goods and chattels belonging to the intestate at the time of his death was granted to him by the Bishop of Chester, and the plaintiff, after craving oyer of the letters of administration, pleaded that the plaintiff had never been administrator of all and singular the goods and chattels of the intestate in manner and form as the plaintiff had in her declaration in that behalf alleged, upon which issue was joined, it was held upon this form of plea, that the only fact put in issue was, whether the letters of administration mentioned in the declaration were duly granted, and that the question whether the defendant resided in the diocese of Chester at the time of the death of the intestate constituted no part of the issue. If the defendant intended to insist that he did not reside in that diocese at the time, and that therefore the administration did not operate upon his debt, he ought to have pleaded the fact specially. *Stokes v. Bate*, 5 B. and C. 491.¹

Where the plaintiff, executor, or administrator, declares on a cause of action arising in his own time, and makes *profert* of the

¹ 11 Eng. Com. Law Reps. 282.

probate or letters of administration, and the defendant pleads the general issue, such plea does not admit the plaintiff's title as executor or administrator, and it must be proved. Thus, where the plaintiff declared as administrator, in an action of trover, on a conversion in his own time, it was held, that the plea of *not guilty*, did not admit his title as administrator, and that as the letters of administration were not properly stamped, he could not recover. *Hunt v. Stevens*, 3 Taunt. 113, but see *Watson v. King*, 4 Campb. 272. But in such case as the naming himself administrator is mere surplusage, *Com. Dig. Pleader*, (2 D. 1.) if the plaintiff could have proved himself in actual possession of the goods for which the action was brought, it seems that it would not have been necessary for him to give evidence of the letters of administration, if the action were against a mere wrong-doer, any possession in such case being sufficient, *see ante*, p. 401.

Where, either on a plea denying the representative character of the plaintiff, or in an action on a cause of action arising in the plaintiff's own time, it becomes necessary to prove the plaintiff's title as executor or administrator, the probate or letters of administration must be produced, *see ante*, p. 59.

Where the grant of letters of administration is merely void, the plaintiff cannot recover, but it is otherwise where it is only voidable. Where the grant of letters of administration is by the archbishop, and there are no *bona notabilia* within his province, such grant is merely void, for each archbishop has supreme jurisdiction, and neither of them can act within the province of the other. *Shaw v. Staughton*, 2 Lev. 86, Hardr. 216, *Com. Dig. Administration* (B. 8). Where there are *bona notabilia* in one diocese of a province, the administration belongs to the bishop of that diocese, but if the metropolitan of that province, in which such diocese is, grants administration, such grant is voidable only, and not void, for it is in force till reversed by sentence, since the metropolitan has jurisdiction over all the dioceses within his province. 3 Bac. Ab. 87, *Com. Dig. Administration*, (B. 3). Where there are *bona notabilia* in two dioceses of the same province, the grant of administration belongs to the archbishop. *Com. Dig. Administration*, (B. 3.) 5 B. and C. 493. And where a man dies intestate, leaving *bona notabilia* in the several provinces, administration shall be granted by each archbishop for the goods in his province. *Com. Dig. ubi sup.*

Bona notabilia are goods to the value of 5l. 93 Canon, Jac. 1, *Com. Dig. Administration* (B. 4). Debts on recognizances, statutes, or judgments, are *bona notabilia*, where they were acknowledged or given. *Ibid.* (B. 4.) Specialties, as bond debts, are *bona notabilia* in the diocese where they are found at the time of the testator's or intestate's death. *Ibid.* But debts by simple contract, as a bill of exchange, *Yeomans v. Bradshaw*, Carth. 378, are *bona nota-*

bilis in the province in which the debtor resides at the time of the testator's death. *Com. Dig. Administration*, (B. 4). A lease or term for years is *bona notabilia* in the diocese in which the lands lie. *Ibid.* But lands devised to executors for payment of debts and legacies are not *bona notabilia*. 11 *Vin. Ab.* 80.

Whether the defendant, when he denies the title of the plaintiff as executor, can show that *probate* has been granted by the ordinary, where it ought to have been granted by the metropolitan, appears to be doubtful. If such grant be *void*, then it would be good evidence under the plea, that the plaintiff is not executor. It is clear that *administration*, granted by a bishop or other inferior judge, when it does not belong to him, is void, *Com. Dig. Administration*, (B. 5); and in one case it is said, that a probate by the diocesan in case of *bona notabilia*, is void, but a prerogative probate where there are no *bona notabilia*, is only voidable, *R. v. Loggan*, 1 *Str.* 75; but Lord Macclesfield appears to have been of opinion, that a probate granted by an inferior judge is not *void*, but only voidable until reversed. *Comber's case*, 1 *P. Wms.* 767, 1 *Saund.* 275, a (n). The reason given for the distinction by Lord Macclesfield is, that an executor takes his authority from the will, but an administrator from the ordinary. Whether the probate be void or not seems to depend on the fact of the ordinary having or not having jurisdiction. The metropolitan has a jurisdiction throughout his province, but the ordinary only in his diocese, and if there be no *bona notabilia* there, he has no jurisdiction, and the probate would seem to be void. So it is said in *Buller's Nisi Prius*, 247, that the adverse party may prove that the testator left *bona notabilia* against the probate by an inferior court, for then such court had no jurisdiction; and see *Allen v. Dundas*, 3 *T. R.* 131.

Where in an action on a cause of action arising in the executor's own time, or where the title of the plaintiff as executor has been denied by the defendant in his plea, it is good evidence that the probate was forged. *B. N. P.* 247, *ante*, p. 83.

In an action brought by several as executors, probate granted to one only of a will appointing all is evidence of the title of all. *Walters v. Pfeil*, 1 *M. and M.* 362.

Defence.

It has been already stated in what cases the defendant may give evidence to disprove the title of the plaintiff as executor or administrator. With regard to the cause of action, the evidence in defence will be the same as in an action between the defendant and the testator or intestate. But on a plea of the statute of limitations to a declaration containing only counts on promises to

the testator, the plaintiff will not be allowed to give evidence of promises or acknowledgments to himself, after the death of the testator. *Dean v. Crane*, 6 Mod. 309. *Sarell v. Wine*, 3 East, 409. In an action against several executors, to take the case out of the statute of limitations as to all, there must be an express promise in writing by all. *Tullock v. Hanley, R. and M.* 416. 9 Geo. 4, c. 14, ante, p. 255.

Evidence of payment.] Payment of a debt to an executor who has obtained probate of a forged will, is a discharge in an action brought against the debtor by the rightful administrator on revocation of the probate. *Allen v. Dundas*, 3 T. R. 125. But a payment of money under the probate of a supposed will of a living person would be void; because, in such case, the ecclesiastical court has no jurisdiction, and the probate can have no effect. *Id.* 130; and see *Woolley v. Clarke*, 5 B. and A. 744.*

Evidence in action against executor de son tort.] In an action of trover or trespass by a rightful executor or administrator, against an executor *de son tort*, the latter may, under the general issue, and in mitigation of damages, give evidence of payments made by himself in the rightful course of administration; but should those payments amount to the full value of the goods claimed, the plaintiff will still, as it seems, be entitled to a verdict for nominal damages. See ante, p. 412; but see *Woolley v. Clarke*, 5 B. and A. 744.* *supra*. And such payments shall not be allowed in damages, if there be a failure of assets, and the lawful executor would by these means be divested of his right of preferring one creditor to another, of equal rank, or giving himself the same preference. 2 Bl. Com. 508. Off. Ex. 182. Toller, 365.

The non-joinder, as plaintiff, of another executor, must be pleaded in abatement, and cannot be given in evidence under the general issue. Com. Dig. Abatement, (E. 13.) 1 Saund. 291, i (n).

Competency of Witnesses.

In an action at the suit of an executor or administrator, if the estate of the testator or intestate is insolvent, a person who has an unsatisfied demand upon it, is not a competent witness for the plaintiff. *Craig v. Cundell*, 1 Campb. 381; but see *Davies v. Davies*, 1 M. and M. 345. But unless the estate is insolvent, the creditor is a competent witness. *Paull v. Brown*, 6 Esp. 34. *Davies v. Davies*, 1 M. and M. 345. In an action by an executor, a paid legatee is a competent witness to increase the estate. *Clarke v. Gannon*, R. and M. 31.

* 7 Eng. Com. Law Reps. 249.

ACTIONS AGAINST EXECUTORS AND ADMINISTRATORS.

In an action against an executor or administrator, the plaintiff must prove that the defendant is executor or administrator, if that fact is denied by plea, and the cause of action, as stated.

An action at law cannot be maintained for the distributive share of an intestate's property against the administrator, nor against his executor, although he may have expressly promised to pay. *Jones v. Tanner*, 7 B. and C. 542.*

Evidence on plea of ne unques executor.] If the defendant intends to deny his being executor or administrator, he must plead such denial specially, for unless pleaded, his representative character is admitted. The proof of the issue on this plea lies upon the plaintiff, and he may support it by production of the probate, or letters of administration, *see ante*, p. 59, or by secondary evidence of them, after a notice to produce served upon the defendant; in such case, as the presumption of law is, that the probate or letters are in the possession of the party who is alone entitled to them, it does not seem necessary to give any evidence in order to show that they are in the defendant's possession. Some proof of the identity of the defendant, and of the person named as executor in the probate, must be given. The plea of *ne unques executor*, does not deny the cause of action, but only that the defendant is one of the representatives of the testator. 1 *Saund.* 207, a (n).

Upon the plea of *ne unques executor*, it is sufficient to give evidence of such circumstances as will render the defendant liable as *executor de son tort*. What acts will make a man *executor de son tort*, is a question of law; but it is for the jury to say whether such facts are sufficiently proved. *Padget v. Priest*, 2 T. R. 97. Evidence of slight acts of intermeddling with the property of the deceased will be sufficient. In one case, merely taking a Bible, and in another a bedstead, was held sufficient. *Noy*, 69. So living in the house and carrying on the trade of the deceased, *Hooper v. Summersett*, 1 Wightw. 16; suing for receiving or releasing the debts due to the estate, *Com. Dig. Administrators* (C. 1); entering on a lease, or term for years, *Bac. Ab. Executors*, B. 3; pleading any other plea than *ne unques executor*, to an action brought against him as executor, *ibid.*, will be evidence to prove the party an *executor de son tort*. So where A. the servant of B. sold goods of C., an intestate, both before and after C.'s death, in pursuance of orders given by C. in his lifetime, and paid the money arising from such sale into the hands of B., it was held that B. was an *executor de son tort*. *Padget v. Priest*, 2 T. R. 97. And where a creditor took

* 14 Eng. Com. Law Reps. 97.

an absolute bill of sale of the goods of his debtor, but agreed to leave them in his possession for a limited time, before the expiration of which time the debtor died, and the creditor took and sold the goods, it was held that he had thereby rendered himself *executor de son tort*. *Edwards v. Harben*, 2 T. R. 587. Merely locking up the goods of the deceased, directing the funeral in a manner suitable to the estate, and out of the effects of the deceased; feeding his cattle, repairing his houses, or providing necessaries for his children will not render the party liable as executor *de son tort*, for they are merely offices of kindness and charity. *Toller*, 40. *Bac. Ab. Executors*, B. 3. *Com. Dig. Administrator* (C. 2). In answer to the evidence adduced to prove him executor *de son tort*, the defendant may show that he took possession of the intestate's goods under a fair claim of right. *Fleming v. Jarratt*, 1 Esp. 335. *Com. Dig. Administrator* (C. 2); or that he acted under the authority of the rightful administrator, *Hall v. Elliott, Peake*, 86; but it is no defence, that he acted as the agent of one named executor, but who has never proved the will. *Cottle v. Aldrich*, 1 Stark. 37.

In assumpsit against several defendants, as executors, with plea of *ne unques executors*, the plaintiff may have a verdict against the real executors on the counts laying the promises by the testator, and the other defendants must be discharged. *Griffiths v. Franklin*, 1 M. and M. 146.

Evidence on plene administravit, proof of assets.] Where the defendant pleads *plene administravit*, and the plaintiff replies that the defendant had assets, the issue lies upon the plaintiff, who must prove assets existing at the time of the writ sued out. *Mara v. Quin*, 6 T. R. 10. If the assets came to the hands of the defendant after the writ sued out, the plaintiff should reply that fact specially, and will not be allowed to give it in evidence under the general replication. *Id.* 11. If the plaintiff reply that he sued out his original on such a day, and that the defendant had assets then, and the defendant takes issue that he had not assets, then the plaintiff need not give in evidence a copy of the original, to prove the time of its being taken out, because the defendant has admitted it in his rejoinder; but if the plaintiff reply assets at the time of exhibiting his bill, viz. on such a day, and conclude his replication to the country, then, though the plaintiff states his bill to have been exhibited on the first day of the term, yet if in fact it was exhibited afterwards, the defendant may take advantage of it on the evidence, so that he shall not be bound for what he paid before. *B. N. P.* 144. In order to prove assets, the plaintiff may give in evidence the inventory exhibited by the defendant in the ecclesiastical court; but a copy of the inventory signed by the appraisers, but not by

the executor, is not evidence. *B. N. P.* 140. Where the defendant has not distinguished the sperate from the desperate debts in the inventory, it has been held that the whole shall, *primâ facie*, be taken to be assets, so as to throw the *onus* of proving some of them desperate upon the defendant. *B. N. P.* 140. *Smith v. Davis*, *Selv. N. P.* 712. But in another case Lord Ellenborough ruled, that it was necessary to prove, presumptively at least, that these debts have been paid, and that it was the universal practice upon the plea of *plene administravit* to prove that effects came into the hands of the defendants. *Giles v. Dyson*, 1 *Stark.* 32.* So, where, to prove assets, an account rendered by the defendants to the plaintiff was given in evidence, in which they stated that 1,000*l.* had been awarded as due to the testator's estate, Lord Ellenborough held that this was not sufficient proof of assets, as it did not show that any part of the sum awarded had been received by the executors. *Williams v. Innes*, 1 *Campb.* 364. If an executor submit to arbitration, such submission, with the award, is not an admission of assets, the arbitrators not directing the defendant to pay the money. *Pearson v. Henry*, 5 *T. R.* 6. But a submission to arbitration, and an agreement to pay what shall be awarded, with an award to pay accordingly, is an admission of assets to the amount of the sum so awarded. *Barry v. Rush*, 1 *T. R.* 691. *Workington v. Barlow*, 7 *T. R.* 453. Proof of an admission by an executor that the debt was just, and that it should be paid as soon as he could, is not evidence to charge him with assets. *Hindsley v. Russell*, 12 *East*, 232. So the payment of interest upon a bond of the testator is not an admission of assets. *Cleverley v. Brett*, cited 5 *T. R.* 8. But a probate stamp is *primâ facie* evidence that the executor has received assets to the amount covered by the stamp. *Foster v. Blakelock*, 5 *B. and C.* 328.†

Though the plea of *plene administravit* in an action of *assumpsit* against an executor, admits a cause of action, yet it does not admit the amount, which must be proved by the plaintiff; but in an action of debt, in which a specific sum is demanded, the specific debt is admitted, and need not be proved. *Shelley's case*, 1 *Stark.* 296, *B. N. P.* 140.

On a plea by several executors that they have fully administered, if some appear to have assets in their hands, and the others not, the latter are entitled to a verdict. *Parsons v. Hancock*, 1 *M. and M.* 330.

Evidence on plene administravit—in answer to proof of assets—payment of debts.] When the plaintiff has given *primâ facie* evidence of assets, the defendant, in answer to such evidence, may prove that those assets have been exhausted by payment of other debts of the deceased, of as high, or of higher degree than the debt of the plaintiff, provided such payments were made before the writ

* 2 Eng. Com. Law Reps. 222. † 11 Id. 246.

purchased. The course of distribution is as follows: 1. All funeral expenses, and the charges of proving the will, or of taking out letters of administration; and the defendant may show that he has retained money in his hands to pay for the expenses of administration, to which he has made himself liable without proving that he has paid them. *Gillies v. Smither*, 2 Stark. 528.* 2. Debts due to the crown by record or specialty. 3. Certain debts created by particular statutes. 4. Debts of record; but unless such debts be docketed according to stat. 4 and 5 W. and M. c. 20, they only rank as simple contract debts. *Hickey v. Haytor*, 6 T. R. 384. 5. Debts due by specialty, and rent. 6. Debts due by simple contract, first to the king, and, secondly, to a subject. *Toller*, 258, 278. *Com. Dig. Administration* (C. 2).

If the defendant has paid debts to the amount, after the suing out, but before notice of the plaintiff's writ, or debt, he must plead such defence specially, and cannot give it in evidence under *plene administravit*, under which no payments made after the action commenced can be given in evidence. *Dyer*, 32, a (margin). *Com. Dig. Administration* (C. 2).

In order to prove the existence and payment of the debt set up by the defendant, he may call the creditor, who is a competent witness, to establish both those facts. *B. N. P.* 143. But where the action is brought on a bond of the deceased, and the defendant pleads *plene administravit*, and relies upon the payment of other bonds of the deceased, the execution of such bonds must be proved by calling the attesting witness in the usual manner, even though the bonds have been destroyed. *Gillies v. Smither*, 2 Stark. 530.* Where, however, the defendant is sued in assumpsit, on a simple contract, and pleads *plene administravit*, and relies upon the payment of bonds of the deceased, it will be sufficient, it is said, to prove the payment, *B. N. P.* 143, for, though no bond, it is yet a good administration.

Evidence on plene administravit, in answer to proof of assets—retainer.] The defendant may either plead a retainer of a debt due to him (which must be a debt of an equal or higher degree than the debt for which the action is brought, in order to entitle the defendant to retain it), or may give it in evidence on the plea of *plene administravit*. 1 *Saund.* 333 (n). So the defendant may retain for payments which he has made out of his own monies before the issuing of the writ, in discharge of debts of the deceased of equal or higher degree than the plaintiff's. *Co. Litt.* 283, a. *B. N. P.* 141. An executor *de son tort* cannot retain for his own debt, though of higher degree, and though the rightful executor, after action brought, has consented to the retainer. *Curtis v. Palmer*, 3 T. R. 587. In answer to such evidence of retainer, the plaintiff may

* 3 Eng. Com. Law Reps. 460.

show the will, and who are the rightful executors. *B. N. P.* 143. Where the defendant pleads a retainer, and also a judgment recovered, which, together, cover the assets, it is sufficient for the plaintiff to falsify either claim. *Campion v. Bentley*, 1 *Esp.* 344.

Evidence on plea of outstanding judgments and debts.] The defendant cannot, under the plea of *plene administravit*, give evidence of the existence of outstanding debts of a higher nature. *B. N. P.* 141. Such defence must be pleaded; and where the defendant pleads a judgment obtained against him for 100*l.* and that he has not goods, except to the value of 5*l.*, and the plaintiff proves that he has 100*l.*, yet he gains nothing, for the substance of the issue is, that the defendant has not above what will satisfy the judgment. *Moin v. Andrews*, *Hob.* 133; 1 *Saund.* 333 (n). Where the defendant pleads an outstanding judgment, the plaintiff may reply that it was obtained or kept on foot by fraud, which the defendant is bound to traverse in his rejoinder; and on this issue the plaintiff may either give in evidence that the debt was not a just one, or that less is due than the sum for which judgment has been given. 2 *Saund.* 50 (n). In answer to the latter evidence, which is *prima facie* proof of fraud, the defendant may show that the judgment was entered for more than was due by mistake. *Pease v. Naylor*, 5 *T. R.* 80. If a judgment is pleaded, and *per fraudem* replied, upon which issue is taken, and it appears in evidence that the creditor was willing to take less than is recovered, it is proof of fraud; but if it be shown that the administrator had not assets to pay that sum, it is no fraud. *Per Cur. Parker v. Atfield*, 1 *Salk.* 812. If the defendant plead several judgments recovered against himself, to which the plaintiff replies fraud, it will entitle the plaintiff to a general judgment, if he can avoid any one of them; for a judgment recovered against an executor being an admission of assets, if any one of the judgments be falsified, the defendant admits by his plea, that he has more assets than will satisfy the other judgments by as much as the judgment, so falsified, amounts to. 1 *Saund.* 337, a (n). When the judgments, or debts pleaded, are upon *penalties*, it seems the right way of replying is, to say that the creditor would have accepted the less sums, but the defendant either would not pay, or had paid them, *but kept the judgments, or bonds, on foot by fraud and covin*; and the plaintiff, on issue joined thereon, may give in evidence such matter as will serve to avoid the penalties. For if he replies, generally, that the judgments were for less sums, and the defendant has assets above what will satisfy them, on the issue that he has not, the defendant has a right to insist on the *penalties* as the debts. 1 *Saund.* 334 (n), citing *Tompson v. Hart*, 3 *Lev.* 368, *Bell v. Bolton*, 1 *Lutw.* 450.

An executor may confess a judgment to a creditor in equal degree with the plaintiff, pending the action, and plead it in bar; and though done for the express purpose of depriving the plaintiff of the debt, it is good both at law and in equity. 2 *Saund.* 51, (n). *Tolputt v. Wells*, 1 *M. and S.* 404. *Pickstock v. Lyster*, 3 *M. and S.* 375.

Where the defendant pleaded a judgment recovered, and the plaintiff replied that it was obtained and kept on foot by fraud, the judgment creditor was called by the defendant to prove that the debt was a fair one; but Eyre, C. J., rejected his testimony, observing, that by establishing the validity of his own debt, he made good his priority of claim to be paid out of the assets of the intestate, and that this was such an interest as rendered him incompetent. *Campion v. Bentley*, 1 *Esp.* 343.

Evidence in an action suggesting a devastavit.] If an executor, or administrator, in an action brought against him as such, admit assets by his pleading, he will not, in an action of debt on the judgment, suggesting a *devastavit*, be allowed to show that he has not assets; and it will be sufficient for the plaintiff, upon issue on the plea of *non devastavit*, to prove the former judgment and the return of *nulla bona* to the *fieri facias*. *Erving v. Peters*, 3 *T. R.* 685. *Skelton v. Hawling*, 1 *Wils.* 259. Where the defendant pleads *non est factum testatoris*, or a release to the testator, or payment by him, or *non assumpsit*, these pleas admit asset. 1 *Saund.* 336 (n). So a judgment for the plaintiff on demurrer, or by default, will be evidence of assets. *Rock v. Leighton*, 1 *Salk.* 310.

ACTIONS AGAINST HEIRS.

IN an action of debt on the bond of the ancestor against the heir (which only lies where the heir is expressly named in the bond, *Co. Lit* 209, a), the usual plea is *riens per descent*.

Evidence on plea of riens per descent.] Upon issue joined on the plea of *riens per descent*, the execution of the bond being admitted by the plea, the plaintiff must prove the assets by showing that the ancestor died seised of an estate in fee, and that it descended from him, as the person who was last actually seised, to the defendant as his heir. The seisin of the ancestor may be proved by showing that he was in possession of the lands, or in the receipts of the rents and profits, *ante*, p. 343. His death must then be proved, and that the defendant is his heir. See *ante*, p. 345. Where the lands have descended from the obligor to another who has died seised, and from him to the

defendant, the descent must be stated specially, as that the defendant was the heir of A. (who died last seised), who was the heir of the obligor; and so it must be where there have been several intermediate descents; for if the declaration be against the defendant, as heir of the obligor, and it appear in evidence on the plea of *riens per descent*, from the obligor, that the defendant is heir of the heir of the obligor, it is a fatal variance. 2 Saund. 7, d (n), *Jenk's case*. Cro. Car. 151. But if the intermediate heirs have not had actual seisin of the fee which descended from the obligor, it seems unnecessary to notice them in the declaration. 2 Saund. 7, d (n). *Kellow v. Rowden*, Carth. 126. It is sufficient in the declaration to charge the defendant as heir generally, without stating how heir, and the plaintiff may show how heir in evidence. *Denham v. Stephenson*, 1 Salk. 355.

Evidence on plea of riens per descent—what are assets.] It is a general rule, that though the ancestor devise the estate to his heir, yet if he take the same estate in quality and quantity that the law would have given him, the devise is a nullity, and the heir is seised by descent, and the estate assets in his hands. 2 Saund. 8, d (n). *Reading v. Royston*, 1 Salk. 242. So where the land is devised charged with the payment of a sum of money, *Clarke v. Smith*, 1 Salk. 241, or of debts. *Allan v. Heber*, 2 Str. 1270. So a rent in fee, issuing out of the heir's land, and descending to him, though extinct, for it has continuance for this purpose. *Co. Litt.* 374, b. So if there be a mortgage for years, the reversion in fee in the mortgagor is legal assets, and the plaintiff may have judgment with a *cesset executio*; but where there is a mortgage in fee, the equity of redemption is not legal assets. 2 Saund. 8, e (n). *Plunket v. Penson*, 2 Atk. 294. So a copyhold in fee is not assets. 4 Rep. 22, a. By the statute of frauds, 29 Car. II. c. 3, s. 12, an estate *pur autrie vie*, which comes to the heir as special occupant, is made assets by descent. Lands which descend in tail are not assets. 1 Roll Ab. 269 (B.) A reversion expectant on an estate in tail is not assets, upon the general issue of *riens per descent*. *Milday's case*, 6 Rep. 42, a; *Kellow v. Rowden*, Carth. 129. A reversion after an estate for life is *quasi assets*, but it ought to be pleaded specially by the heir, and the plaintiff may take judgment of it *quando acciderit*. *Ibid.* *Dyer*, 373, b.

If the defendant pleads *riens per descent*, and the jury find that he has something, however small it may be, and insufficient to discharge the debt, the plaintiff is entitled to a general judgment for the debt, damages, and costs, and to sue out the like execution against him as on a judgment for his own debt. 2 Saund. 7, a (n). It is, therefore, unnecessary to prove the value of the assets descended.

Evidence on plea of riens per descent—replication under stat. 3 W. and M. c. 14, s. 5.] At common law, if the heir had *bonâ fide* alienated the lands, which he had by descent, before an action was commenced against him, he might discharge himself by pleading that he had nothing by descent *at the time of suing out the writ or filing the bill*, and the obligee had no remedy at law; 2 *Saund.* 7, c (n); though under this issue he might show that the heir had alienated the lands by covin. *Ibid.* *Dyer*, 149, a. margin. But by 3 W. and M. c. 14, s. 5, where any heir at law shall be liable to pay the debts of his ancestor, in regard of any lands, tenements, or hereditaments, descending to him, and shall sell, alien, or make over the same, before any action brought, or process sued out against him, such heir at law shall be answerable for such debt or debts, in an action or actions of debts to the value of the said land so by him sold, aliened, or made over, in which cases all creditors shall be preferred as in actions against executors and administrators; and such execution shall be taken out upon any judgment, or judgments, so obtained against such heir, to the value of the said land, as if the same were his own proper debt or debts, saving that the lands, tenements, or hereditaments, *bonâ fide* aliened before the action brought, shall not be liable to such execution. And by section 6, where any action of debt upon any speciality is brought against any heir, he may plead *riens per descent*, at the time of the original writ brought, or the bill filed against him, and the plaintiff may reply *that he had lands, tenements, or hereditaments from his ancestor, before the original writ brought, or bill filed*; and if, upon the issue joined thereupon, it be found for the plaintiff, the jury shall inquire of the value of the lands, &c. so descended, and thereupon judgment shall be given, and execution shall be awarded as aforesaid; but if judgment be given against such heir by confession of the action, without confessing the assets descended, or upon demurrer, or *nil dicit*, it shall be for the debt and damages, without any writ to inquire of the value of the lands, &c., so descended. When issue is joined on this replication (which may, it seems, be pleaded, though the heir has *not* aliened the lands), 2 *Saund.* 8 (n), the plaintiff, in addition to the usual proofs under the plea of *riens per descent*, must be prepared with evidence of the *gross* value of the lands descended, for if the jury neglect to find the value, the court will award a *venire de nova*. *Jeffrey v. Barrow*, 10 *Mod.* 18.

Evidence in action against heir and devisee.] At common law, if the ancestor had devised the lands, a bond creditor had no remedy against the devisee. But by stat. 3 W. and M. c. 14, s. 2, all wills and testaments, limitations, dispositions, or appointments, of or concerning any manors, messuages, lands, tenements, or hereditaments, or of any rent, profits, term, or charge out of the same,

whereof any person at the time of his or her decease, shall be seised in fee simple in possession, reversion, or remainder, or have power to dispose of the same by his or her last will or testament, thereafter to be made, shall be deemed and taken only as against such creditor or creditors as aforesaid, his, her, or their heirs, successors, executors, administrators, and assigns, and every of them, to be fraudulent, and clearly, absolutely, and utterly void, &c. And by section 3, in the cases before mentioned, every such creditor or creditors shall and may have and maintain his, her, or their action of debt, upon his, her, or their said bonds and specialties, against the heir and heirs at law of such obligor or obligors, and such devisee or devisees, jointly, by virtue of this act; and such devisee or devisees shall be liable and chargeable for a false plea by him or them pleaded, in the same manner as any heir should have been for any false plea by him pleaded, or for not confessing the lands or tenements to him descended. And by section 7, all and every devisee and devisees, made liable by this act, shall be liable and chargeable in the same manner as the heir at law, by force of this act, notwithstanding the lands, tenements, and hereditaments to him or them devised shall be aliened before the action brought. By section 4, devisees for payment of debts, and portions of children, in pursuance of a settlement before marriage, are excepted from the operation of the act. An action of *covenant* did not lie against a devisee under this act, *Wilson v. Knubley*, 7 East, 128; but see the provisions of 11 Geo. IV. and 1 Wil. IV. c. 47; nor does the act extend to any settlement or disposition made by the obligor by *deed* in his lifetime. *Parsloe v. Weedon*, 1 Eq. Ab. 149, 2 Saund. 8, c (n).

The act of W. and M. is repealed by 11 Geo. IV. and 1 Wil. IV. c. 47. The cases on the former statute are applicable to the new act, which re-enacts the provisions of the old one, and extends the remedy against the heir and devisee to the case of covenants and other specialties.

ACTIONS AGAINST JUSTICES.

In an action against a justice of the peace, the plaintiff, in addition to his other proofs, must prove the delivery of a notice under 24 Geo. II. c. 44, and the commencement of the action in proper time.

By 24 Geo. II. c. 44, s. 1, no writ shall be issued out against, nor any copy of any process at the suit of a subject, shall be served on any justice of the peace, for any thing by him done in the execution of his office, until notice in writing of such intended writ or

process shall have been delivered to him, or left at the usual place of his abode by the attorney or agent for the party who intends to sue, or cause the same to be sued out or served, at least one calendar month before the suing out or serving the same, in which notice shall be clearly and explicitly contained the cause of action which such party hath or claimeth to have against such justice of the peace; on the back of which notice shall be indorsed the name of such attorney or agent, together with the place of his abode.

By section 5, no evidence shall be permitted to be given by the plaintiff of any cause of action, except such as is contained in the notice thereby directed to be given.

To what cases the statute extends.] It has been frequently observed by the courts, that the notice which is directed to be given to justices and other officers, before actions are brought against them, is of no use to them when they have acted within the strict line of their duty, and was only required for the purpose of protecting them in those cases where they intended to act within it, but by mistake exceeded it. *Per Lord Kenyon, Greenway v. Hurd*, 4 T. R. 553. It has uniformly been held, that where a party *bonâ fide* believes or supposes he is acting in pursuance of an act of Parliament, he is within the protection of such a clause. *Per Lord Tenterden, Beechey v. Sides*, 9 B. and C. 809.* 'Therefore, where a magistrate committed the mother of a bastard child, though two magistrates only have jurisdiction in such case, he was held entitled to notice, for he intended to act as a magistrate at the time, however mistakenly. *Wheller v. Toke*, 9 East, 364. So where he has authority over the subject matter of the complaint, though the place where the offence is committed is not within his jurisdiction. *Prestridge v. Woodman*, 1 B. and C. 12.† So where a magistrate committed a driver for being on the shafts of a cart standing still, the act only authorizing commitment for riding on them. *Bird v. Gunston*, cited in *Cook v. Leonard*, 6 B. and C. 354.‡ Where the capacity in which plaintiff acted is equivocal, as where a lord of a manor, being also a justice of peace, seized a gun in the house of an unqualified person, it will be presumed that he acted as a justice. *Briggs v. Evelyn*, 2 H. Bl. 114. But where the act in question has not been done in the capacity of justice, and cannot be referred to that character, but is wholly *diverso intuitu*, notice is not required: thus where a justice of the peace, who was also a mayor of a borough, received a fee for granting a license to a publican, it was held that such fee could not have been taken by him in his character of justice, and that he was not within the statute. *Morgan v. Palmer*, 2 B. and C. 729.¶ So in an action against a person to recover a penalty for acting as a justice of the peace, not being duly qualified, no notice need be proved. *Wright v. Horton*,

* 17 Eng. Com. Law Reps. 502. † 8 Id. 9. ‡ 13 Id. 196. ¶ 9 Id. 232.

Holt, 558.* The statute extends only to actions of tort, and not to assumpsit. *B. N. P.* 24.

Notice—form of.] The notice must specify the writ or process intended to be sued out, as well as the cause of action. *Lovelace v. Currie*, 7 *T. R.* 631. A notice that an action on the case for false imprisonment and assault would be brought, was held improper. *Strickland v. Ward*, *ib.*, (n). It is unnecessary to name all the parties to be included in the action, or to express whether it will be joint or several. *Box v. Jones*, 5 *Price*, 178. So a notice to a magistrate is sufficient to warrant a writ and proceedings against the magistrate and a constable jointly; and where such a notice was given, and the plaintiff, after a month had expired, sued out a writ against the magistrate alone, and afterwards abandoned that writ, and sued out another against the magistrate and constable jointly, the notice was held sufficient. *Jones v. Simpson*, 1 *Crom. and Jer.* 174. It seems that the statute does not require the Christian name of the attorney to be indorsed on the notice; at all events the initials are enough; thus where the indorsement was "T. and W. A. Williams," the names of the attorneys being *Thomas Adams Williams* and *William Adams Williams*, it was held sufficient. *James v. Swift*, 4 *B. and C.* 681; *Mayhew v. Lock*, 7 *Tam.* 68. It has been held that the attorney may describe himself generally of the town in which he resides, as of "Birmingham;" *Osborn v. Gough*, 3 *B. and P.* 550; but in *Crooke v. Currie, Tidd*, 28 (n), it was said by Thomson, B., that *London, Manchester*, or other such large town, generally, would not be sufficient. A notice written by the attorney, and signed by him thus, "Under my hand at Durham," is insufficient. *Taylor v. Fenwick*, cited 7 *T. R.* 635, and 3 *B. and P.* 551. If the notice describes the attorney as of "New Inn, London," which in fact is in Westminster, it is bad. *Stears v. Smith*, 6 *Esp.* 138. If the attorney's name and place of abode are in the body, instead of the back of the notice, it is sufficient; for the intent of the statute is, that the justice may be able to tender amends to the party or his attorney. *Crooke v. Curry, coram Thomson, B. Tidd*, 27 (n). It is sufficient if the notice specify the writ or process, and the cause of action; the form of action is not required to be set out. *Sabin v. De Burgh*, 2 *Campb.* 106. It should seem, however, that if it is specified, it must agree with the declaration; for where the notice was of an action on the case for false imprisonment, &c., and the action brought was *trespass*, the objection was held good. *Strickland v. Ward*, 7 *T. R.* 633 (n). See also 4 *Bingh.* 511—2.* Where the notice stated, that a precept called a *latitat* would be issued against the defendant "for the said imprisonment and sum of money," and the declaration was for assault, battery, and imprisonment, the notice was held good,

* 3 *Eng. Com. Law Reps.* 156. * 10 *Id.* 441. * 2 *Id.* 27. * 15 *Id.* 61.

being sufficient to apprise the magistrate of the nature of the action about to be brought against him, so as to enable him to tender amends; and that the only effect which the omission of any mention of *battery* in the notice could produce, would be to exclude evidence of a battery at the trial. *Robson v. Spearman*, 3 B. and A. 498.^a In stating the cause of action, it is sufficient to inform the defendant substantially of the cause of complaint. *Tidd*, 27. *Jones v. Bird*, 5 B. and A. 844.^b It seems that the cause of action, as stated in the notice, must not vary from that proved, though stated with needless particularity: thus, where the notice described the defendant's warrant as directed to *J. Bark*, and it was in fact directed to "the constable of Halifax" (which *J. Bark* was not), it was held insufficient. *Aked v. Stocks*, 4 Bingh. 509.^c But the notice is not vitiated by being in the form of a declaration, and unnecessarily ample, if it express the cause of action with sufficient clearness. *Brown v. Tanner, McClel. and Y.* 469.

Evidence of notice—delivery.] The plaintiff must prove, that the notice was delivered to the justice, or left at the usual place of his abode, at least one calendar month before the suing out or serving of the writ. The month begins with and includes the day on which the notice was served. *Castle v. Burdett*, 3 T. R. 623. The notice may be proved by a duplicate original. See *ante*, p. 4, 162.

Evidence of the commencement of the action.] The plaintiff must prove, under the general issue, that the action was commenced within six calendar months after the act committed. 24 G. II. c. 44, s. 8, *ante*, p. 457. In case of a continuing imprisonment, a justice is liable to answer for such part of it, suffered under his warrant, as was within six calendar months before the action commenced. *Massey v. Johnson*, 12 East, 67. If the imprisonment ends on the 14th December, it is a sufficient commencement of the action if the writ issues on the 14th of June. *Hardy v. Ryle*, 9 B. and C. 603.^d The plaintiff must show that he proceeded on a writ sued out within six months after the notice, though there be a continuing cause of action; for the notice fixes him to the trespass of which he complains; therefore a second writ sued out of time must be connected by continuance with one within time. *Weston v. Fournier*, 14 East, 491. Unless the action appear by the record to be brought in proper time, the plaintiff must produce the writ, or if it be returned, an examined copy of it, *ante*, p. 56; but the defendant may show the real time when the writ issued, in opposition to the *teste*. *Johnson v. Smith*, 2 Burr. 964.

^a 5 Eng. Com. Law Reps. 355. ^b 7 Id. 277. ^c 15 Id. 60. ^d 17 Id. 456.

Evidence of cause of action.] It must appear, that the cause of action arose in the county in which the action is brought. See *ante*, p. 458, 21 Jac. L. c. 12, s. 5. Where the defendant committed his servant for insolent disobedience, it was held that the action must be laid in the proper county, because he supposed he had a right to commit as a justice. *Holton v. Bordero*, cited *per cur.* 5 Bingh. 339.* In case of imprisonment under the warrant of a magistrate, in order to connect the magistrate with the act, a notice to produce the warrant should be served upon the defendant, if the warrant be in his possession, so as to enable the plaintiff to give secondary evidence of its contents. But if the warrant remains in the hands of the officer, the latter must be served with a *subpoena duces tecum*. The connexion between the justice and the officer may likewise be proved by showing that the former has recognised the acts of the latter.

Evidence of malice in action brought after conviction quashed.] By 43 Geo. III. c. 141, s. 1, in all actions against any justice of the peace, on account of any conviction made by him under any act of parliament, or for any act done by him for the levying of any penalty, apprehending any party, or for the carrying of any such conviction into effect, in case such conviction shall have been quashed, the plaintiff, besides the value and amount of the penalty levied upon him, (in case any levy shall have been made,) shall not be entitled to recover any greater damages than the sum of two-pence, nor any costs of suit, unless it shall be expressly alleged in the declaration in the action, (which action shall be an action upon the case only,) that such acts were done *maliciously*, and *without any reasonable or probable cause*; and by section 2, the plaintiff shall not be entitled to recover any penalty which shall have been levied, nor any damages or costs whatsoever, in case such justice shall prove at the trial that such plaintiff was guilty of the offence whereof he had been convicted, or on account of which he had been apprehended, or had otherwise suffered; and that he had undergone no greater punishment than was assigned by law to such offence. The magistrate is protected by the statute only where there is a conviction quashed. But an informal one is enough, as where the warrant of commitment falsely recited an information on oath by T. S., which was in fact laid by T. O. *Massey v. Johnson*, 12 East, 67.

In an action against a magistrate for a malicious conviction the question is, not whether there was any actual ground for imputing the crime to the plaintiff, but whether upon the hearing there appeared to be none. The plaintiff must prove a want of probable cause for the conviction, which he can only do by proving what passed upon the hearing before the magistrate, when the conviction

* 15 Eng. Com. Law Reps. 462.

took place. The magistrate has nothing to do with the guilt or innocence of the offender, except as they appear from the evidence laid before him. *Per Gibbs, C. J., Burley v. Bethune, 5 Taunt. 583.*

Defence.

The defendant may show special matter under the general issue. See 21 Jac. I. c. 12, s. 5, *recited ante, p. 458.*

In what cases Justices are protected by evidence of conviction.] The general rule with regard to the effect of a conviction, when offered in evidence as a justification, in an action against a magistrate, has been already stated. See *ante, p. 109.*

Where the subject matter of the conviction is not within the jurisdiction of the justice, the conviction will be no defence in an action brought against him, for it is merely void. Thus where a person was convicted in four several convictions for exercising his ordinary calling on a Sunday, contrary to 29 Car. II. c. 7, it was held, that as a man could only commit one offence under the statute on the same day, the three latter convictions were void; and, it being an excess of jurisdiction, an action lay. *Crepps v. Durdon, Cowp. 640, 16 East, 21, 22.* So where the defendant had convicted the plaintiff for destroying game, and, though (as it was proved) the plaintiff had effects which might have been distrained, and sufficient to answer the penalty, sent him to Bridewell, it was held that trespass lay. *Hill v. Bateman, 1 Str. 710.* So a conviction by two justices, under 17 Geo. II. c. 38, upon complaint of the overseers of a parish against the late overseer, for refusing and neglecting to deliver over to them a certain book belonging to the parish, called the bastardy ledger, convicting him of the said offence, and adjudging that he should be committed to the common gaol, to be safely kept until he should have yielded up *all and every books* concerning his said office of overseer, belonging to the parish, was held void as to the adjudication respecting the imprisonment for excess, the same extending beyond what was previously required of the person convicted; and a warrant of commitment founded on this conviction, and directing the gaoler to keep him, in the terms of the adjudication, was also held void *in toto*, for which trespass and false imprisonment would lie against the justices, although the conviction had not been quashed. *Groome v. Forrester, 5 M. and S. 314.* So where a conviction on a statute does not pursue the provisions of it on the face of it; as where an information is to be laid at a special or petty sessions, and this does not appear on it. *Gimbert v. Coyney, M. and Y. 460.* A warrant of commitment for re-

¹ Eng. Com. Law Reps. 198.

examination for an unreasonable length of time, is wholly void; *Davis v. Capper*, 10 B. and C. 28.

It appears to have been doubted, whether the plaintiff, in reply to the conviction relied on by the defendant, might not show by extrinsic evidence that the subject matter of the conviction was not within the jurisdiction of the defendant, though it seems quite clear, that if the magistrate have jurisdiction, it cannot be shown that he has come to a wrong conclusion. In *Terry v. Huntington*, *Hardr.* 480, which was an action of trover brought to recover the value of goods levied under the warrant of the commissioners of excise, it was held, that it appearing upon special verdict, that they had adjudged low wines to be strong wines, and so had exceeded their jurisdiction, the warrant was void; and *per Hale, C. J.*, where the jurisdiction itself is stinted and examinable, there their acts are so too, and their judgment is no estoppel if the matter be not within their jurisdiction, which is a particular and circumscribed one. So in the above cited case of *Hill v. Bateman*, extrinsic evidence was admitted to show that the plaintiff had effects which might have been distrained. So it is said by Lord Ellenborough, with regard to *an order* of justices for diverting a highway, that justices cannot make facts by their determination, in order to give to themselves jurisdiction contrary to the truth of the case. *Welsh v. Nash*, 8 *East*, 402, 1 B. and B. 439,^c and see the observations of Le Blanc, J., 12 *East*, 67, 62. *Fuller v. Potch, Carth.* 346. It might, perhaps, be contended, that the conviction of a magistrate cannot be more conclusive upon the facts therein stated, than the sentence of an ecclesiastical court, or the judgment of an inferior court, in both of which cases evidence may be given to show that the court had no jurisdiction, *ante pp.* 102, 107. The case of *Strickland v. Ward*, 7 T. R. 634 (n), has been sometimes referred to as an authority to show that such evidence is not admissible, but it does not appear that the evidence in that case was offered for the purpose of proving a want of jurisdiction. "I gave my opinion," says Mr. J. Yates, "that this conviction could not be controverted in evidence; that the justice, *having a competent jurisdiction of the matter*, his judgment was conclusive till reversed or quashed." In *Gray v. Cookson*, 16 *East*, 23, it seems to have been the opinion of the court, that the plaintiff could not rely upon any matter which did not appear on the face of the conviction, and it appears to be now settled, that if the jurisdiction appears on the face of the conviction, it is conclusive. *Basten v. Carew*, 3 B. and C. 649,^a *Fawcett v. Fowles*, 7 B. and C. 394.¹ Thus where a magistrate convicts under an act giving him jurisdiction in the case of boats; or for having partridges in possession, or keeping a dog without qualification, the plaintiff cannot show that there

^c 5 Eng. Com. Law Reps. 137. ^a 10 Id. 211. ¹ 14 Id. 59.

was no boat, no partridge, or no dog. *Brittain v. Kinnaird*, 1 B. and B. 432. 442.*

In order to render the conviction a good defence, it must be connected with the commitment, and if it be a conviction for an offence differing from that recited in the commitment, it will furnish no justification, *Rogers v. Jones*, 3 B. and C. 409,¹ and *semb.* the guilt of plaintiff is not evidence in mitigation, *S. C., R. and M.* 129. So if the warrant of commitment does not show an offence over which the justice had jurisdiction, a previous regular conviction will be no defence. *Wickes v. Clutterbuck*, 2 Bingh. 483.² But where the warrant of commitment recited that the party had been charged on the oath of J. S., but it appeared in evidence that he was charged on the oath of J. O., it was held, that the recital of this false fact might be rejected, and that the warrant and conviction would then stand good. It was added by Le Blanc, J., that the objection would have assumed a very different shape, if there had been no information on oath of any person whereon to found the conviction. *Massey v. Johnson*, 12 East, 67, 82. Where a justice, instead of drawing up a regular conviction, ordered the offender into custody till he could settle the matter with the prosecutor, which he accordingly did and was dismissed, it was held that the justice could not justify in an action of trespass. *Bridgett v. Coyney*, 1 M. and R. 211.

The acts of a justice who has not duly qualified by taking the oaths, &c. are not absolutely void, so as to make him a trespasser. *Margate Pier Company v. Hannam*, 3 B. and A. 266.³ A commitment for a contempt must be by writing. *Mayhew v. Locke*, 2 Marsh. 377.⁴

It is not material that the conviction should be drawn up formally at the time when it takes place. It will properly bear date at the time when in fact it took place, and the court will give credit to it, as to a conviction made at that time, when produced in a collateral proceeding, such as an action of trespass; however, they may inquire of the time upon any other occasion, when the conviction is directly impeached. *Per Lord Ellenborough, C. J., Gray v. Cookson*, 16 East, 20, *Massey v. Johnson*, 12 East, 82, *M'Cl. and Y.* 478.

Where the warrant and conviction state all the circumstances which are essential to give them validity, and are connected by internal reference, no other evidence appears to be necessary than the production of them. *Strickland v. Ward*, 7 T. R. 631. And it is not competent for the plaintiff to show irregularity in the proceedings, as that no summons issued. *Goss v. Jackson*, 3 Esp. 198, *see* 12 East, 74 (n).

[*Excused in case of error in judgment.*] Where a magistrate acting within his jurisdiction does an act, which under the circum-

* 5 Eng. Com. Law Reps. 137. ¹ 10 Id. 124. ² 9 Id. 490. ³ 5 Id. 278.

⁴ 2 Id. 27.

stances is not justifiable, still as he is bound to exercise a judgment on the case, he is not liable for a mere error of judgment. *Mills v. Collett*, 6 Bingh. 85.*

Tender of amends.] By 24 G. II. c. 44, s. 2, it shall and may be lawful for such justice of the peace, at any time within one calendar month after such notice, to tender amends to the party complaining, or his agent or attorney, and in case the same is not accepted, to plead such tender in bar; and if upon issue joined thereon, the jury shall find the amends so tendered to have been sufficient, then they shall give a verdict for the defendant; and if upon issue so joined, the jury shall find that no amends were tendered, or that the same were not sufficient, and also against the defendant on other pleas, then they shall give a verdict for the plaintiff, and such damages as they shall think proper, &c.

Where the defendant pleaded 40s. amends, and the tender was admitted by the replication, and the notice of action was for seizing and carrying away goods to the value only of 40s., it was held that the plaintiff could claim no more than 40s., which being covered by the tender, he was nonsuited. *Stringer v. Martyr*, 6 Esp. 134.

ACTIONS AGAINST SHERIFFS.

THE evidence in actions against sheriffs will be considered under the following heads:—1. For taking the plaintiff's goods in execution. 2. For taking the goods of a tenant in execution without paying the arrears of rent. 3. For not paying over money levied. 4. For not arresting a debtor. 5. For an escape on mesne process. 6. For an escape in execution. 7. For taking insufficient pledges in replevin. 8. For a false return. 9. For extortion.

For taking the plaintiff's Goods.

In trespass or trover for taking the plaintiff's goods, the plaintiff under the general issue must prove the property of the goods and the taking by sheriff.

Evidence of property.] In general it will be sufficient for the plaintiff to show that he was in possession of the goods at the time of the seizure, which will be *primâ facie* evidence of property, *ante*, p. 178. If, not having been in possession himself, he relies upon an assignment from a former owner, he must prove the pos-

* 19 Eng. Com. Law Reps. 11.

session of such former owner, and the assignment to himself in the regular manner.

Evidence of the taking.] If the action be in trover, the plaintiff must prove an act amounting to a conversion, or must show a demand and refusal, *ante*, p. 404; if in trespass he must prove some injury to the goods, or an *asportavit*. The production of a bill of sale executed by the defendant, and reciting the issuing of a writ and the seizure of the goods, will be evidence of a taking in trespass. *Woodward v. Larking*, 3 *Esp.* 286.

Evidence of the taking—connexion between the sheriff and the bailiff.] In order to establish the connexion between the sheriff and his bailiff, and to affect the former with the acts of the latter, the warrant should be proved, though it is not the only medium by which the privity of the sheriff with the act of his bailiff may be established. *Martin v. Bell*, 1 *Stark.* 417.^a Proof of the warrant issued by the under sheriff, under the sheriff's seal of office, is sufficient without proof of the writ. *Gibbins v. Phillippis*, 7 *B. and C.* 535^b (n). If the warrant remains in the hands of the bailiff, as, if executed, it usually does, for his justification, a *subpœna duces tecum* should be served upon the bailiff. If it has been returned to the sheriff's office, a notice to produce should be given, and secondary evidence will then be admissible; and where the warrant, after the levy, had been returned by the bailiff to the under-sheriff, the sheriff still being in office, it was held that a notice to produce, served upon the attorney of the sheriff, was sufficient. *Taplin v. Atty*, 3 *Bingh.* 165.^c It will not be sufficient, in order to establish the connexion between the sheriff and bailiff, to show that the latter is the bound bailiff of the former, and to produce and prove a paper received from the bailiff, purporting to be a copy of the warrant, *Drake v. Sykes*, 7 *T. R.* 113; nor is it sufficient to produce an examined copy of the precept, with the bailiff's name indorsed on it, though the sheriff has returned *cepi corpus*. *Martin v. Bell*, 1 *Stark.* 413.^a So where an examined copy of the writ and return with the bailiff's name written on the margin was produced, Lord Ellenborough held it insufficient to connect the sheriff with his acts; *Jones v. Wood*, 3 *Campb.* 228, *Hill v. Sheriff of Middlesex*, *Holt*, 217,^c 7 *Taunt.* 8,^a *S. C.*, *Morgan v. Brydges*, 2 *Stark.* 314;^b but see *Blatch v. Archer*, *Cowp.* 63, *Macneil v. Perchard*, 1 *Esp.* 263, *Fermor v. Phillips*, 5 *Moore*, 184,^a (n), 3 *B. and B.* 27^a (n), *Bowden v. Wait-ham*, 5 *Moore*, 183,^a where it was held that the fact of the bailiff's name appearing upon the writ, without further proof, was evidence to go to the jury of the connexion between the sheriff and the bailiff. If the writing of the bailiff's name on the writ be prov-

^a 2 Eng. Com. Law Reps. 449. ^b 14 Id. 97. ^c 11 Id. 81. ^d 3 Id. 79.

^e 2 Id. 6. ^f 3 Id. 361. ^g 16 Id. 392. ^h 7 Id. 335.

ed to have been by the authority of the sheriff, it will be sufficient to establish the connexion between them. Thus where, in an action for an escape, the writ produced bore two indorsements, and the witness who produced the writ said that he belonged to the sheriff's office, that the writ came to the sheriff's office from the plaintiff's agent, marked with the bailiff's name, and that he (the witness) again indorsed the bailiff's name on it, the court thought the sheriff's authority sufficiently proved. *Francis v. Neave*, 3 B. and B. 26.⁷ So where the plaintiff offered in evidence the writ, with the name of the bailiff indorsed upon it, and it was also proved that the writ had been sent to the under-sheriff's office, where the name of the bailiff had been indorsed upon it; and it was proved to be the custom of the office to indorse upon the writ the name of the bailiff who was to execute the process, *Richards, C. B.* was of opinion that this evidence was sufficient to connect the sheriff with the act of the bailiff. *Tealby v. Gascoigne*, 2 Stark. 202.^a

So where a paper was produced, on notice, from the sheriff's office, containing an order to the bailiff to give the necessary instructions for making a return to the writ in question, and his answer, Lord Ellenborough held, that it amounted to a clear recognition of the bailiff by the sheriff. *James v. Wood*, 3 Campb. 229. So where the plaintiff proved that a bail bond, which had been executed and delivered to the bailiff, had been returned to the sheriff, who had made his return of *cepi corpus*, Lord Ellenborough held, that this was sufficient to prove the agency of the bailiff. *Martin v. Bell*, 1 Stark. 416.^a

Evidence of the taking—connexion between the sheriff and the bailiff—admissions by the bailiff.] The under sheriff is the general deputy of the high-sheriff for all purposes, per Lord Kenyon, *Drake v. Sykes*, 7 T. R. 116, and therefore his admissions are evidence against the sheriff, without previous proof of his authority in the particular instance. But as the bailiff is not the general officer of the sheriff, it is necessary to show his agency in the particular instance, before an admission by him can be made evidence against the sheriff, and it will then only be evidence in the same manner, and to the same extent, as an admission by any other agent. See ante, p. 29, *Bowsher v. Calley*, 1 Campb. 394 (n).

Defence.

In an action for taking the plaintiff's goods in execution, one of the most usual defences is, that the goods have been fraudulently assigned to the plaintiff, and that they are in fact the goods of the party against whom the writ issued. This defence, either in

⁷ Eng. Com. Law Reps. 334. ^a 3 Id. 313. ^a 2 Id. 449.

trespass or trover, is open to the defendant under the general issue, for it shows that the goods are not the goods of the plaintiff.

If the plaintiff has never been in possession of the goods, but claims them by an assignment, under which possession has never been given, it will, as it seems, be sufficient for the defendant to show that the assignment is fraudulent and void, and it will not be necessary for him in such case to go further and prove the judgment and writ under which the goods were taken; *but see Martin v. Podger*, 5 Burr. 2633; but if the plaintiff was in possession of the goods at the time of the taking, the defendant must prove the writ and judgment, for otherwise he would appear to be a mere wrong-doer, and the plaintiff being in possession, would have a sufficient title as against him. *Lake v. Billers*, 1 Ld. Raym. 733, *see Martin v. Podger*, 5 Burr. 2631. If the goods were in fact the goods of the plaintiff, but the defendant justifies the taking of them under a *fi. fa.* against him, such defence cannot be given in evidence under the general issue in trespass, but must be pleaded specially.

Evidence of fraudulent assignment.] In general the continuing possession of the vendor or assignor is evidence of fraud. *Twyne's case*, 5 Rep. 80 (b). Where a debtor executed a bill of sale of his goods to his creditor on the 27th March, and possession was given by the delivery of a corkscrew, but all the effects continued in the possession of the debtor till the 7th April, when he died, it was held that the bill of sale was fraudulent. *Edwards v. Harben*, 2 T. R. 587, *see 1 B. and B.* 512,^b 1 Taunt. 382. So where an assignment to a creditor was made, and a servant of the assignee was immediately put into the house, but the assignor continued to carry on the business, as usual, for several weeks after, Lord Ellenborough held that a concurrent possession with the assignor was colourable, and that there must be an exclusive possession under the assignment, or it is fraudulent and void as against creditors. *Wordall v. Smith*, 1 Campb. 322, *but see Benton v. Thornhill*, 7 Taunt. 149,^c *Latimer v. Batson*, 4 B. and C. 653,^d *Eastwood v. Brown, R. and M.* 313, *post*.

The want of transfer of possession, is not in all cases a mark of fraud, as where A. lends B. money to buy goods, and at the same time takes a bill of sale of them for securing the money. *B. N. P.* 258, 2 B. and P. 60, *Steel v. Brown*, 1 Taunt. 381. So where the goods of A. being taken in execution, and put up to sale, B. became the purchaser, and took a bill of sale of the sheriff, but permitted A. to continue in possession, it was held that this transaction was valid. *Kidd v. Rawlinson*, 2 B. and P. 59. So where the husband of the plaintiff's mother absconded, and his effects were publicly

^b 5 Eng. Com. Law Reps. 169. ^c 2 Id. 52. ^d 10 Id. 432.

sold by auction, and the plaintiff purchased them in order to accommodate his mother, and removed some, but left the greater part in her possession, it was held that there was a *bonâ fide* change of property. *Leonard v. Baker*, 1 M. and S. 251, and see *Jezeeph v. Ingram*, 1 B. Moore, 189.* So where a creditor, having taken the goods of his debtor in execution, afterwards bought them at a public auction by the sheriff, and paid for them, and took a bill of sale, and let them to the former owner at a rent, which was actually paid, the sale was held to be valid. *Watkins v. Birch*, 4 Taunt. 823. And when goods were seized and sold by the landlord, under a distress for rent, and purchased by a trustee of the tenant's estate, for the benefit of the creditors, and were permitted by the trustee to remain in the possession of the tenant, it was held that they were not liable to be taken in execution by a creditor of the tenant. *Guthrie v. Wood*, 1 Stark. 367.† So where the goods of A. were seized under a *fi. fa.*, and the judgment creditor took a bill of sale from the sheriff, and afterwards sold the goods to B. who put a man into possession, but the goods remained in A.'s house and were used by him as before the execution, it was held (the circumstances of the execution being notorious in the neighbourhood) that the sale was good. *Latimer v. Batson*, 4 B. and C. 852.‡ Again, where a debtor, previous to an execution, sold, for the full value, the whole of his lease, furniture, and household effects, to a creditor, and out of the purchase money paid several of the other creditors, but continued in the occupation of the house and furniture after the assignment, the sale was held to be valid; and *per Abbott, C. J.* the circumstance of an assignor, who is under pecuniary embarrassments, remaining in possession of the property assigned, is always suspicious; but if it does not appear from other facts of the case that this takes place under a fraudulent arrangement between the parties, for the purpose of delaying creditors, I am of opinion that it is not of itself a *conclusive* badge of fraud. *Eastwood v. Broun, R. and M.* 312. The not taking possession is in some measure indicative of fraud, but is not conclusive; to make it absolutely void there must be something that shows the deed fraudulent in the concoction of it. *Per Ld. Ellenborough, Hoffman v. Pitt*, 5 Esp. 25. So where a farmer gave a bill of sale of all his stock to secure a debt, and the agent of the creditor took possession, and resided on the farm while he converted the stock, but the debtor continued also to reside on the farm, and exercised acts of ownership, and appeared as master, the agent of the creditor giving orders in his name, the jury having found the transaction good, the court refused to disturb the verdict. *Benton v. Thornhill*, 7 Taunt. 149.‡

An assignment of a part of a debtor's effects, for the benefit of certain creditors, not made with the intention of fraudulently delaying his other creditors, is good. *Estwick v. Caillaud*, 5 T. R. 420.

* 4 Eng. Com. Law Reps. 303. † 2 Id. 430. ‡ 10 Id. 432. § 2 Id. 52.

So where A. was indebted to B., and also to C., and being sued to execution by B., voluntarily gave a warrant of attorney to C., on which judgment was entered, and execution levied, on the day on which B. would have been entitled to execution, it was held that this preference was legal. *Holbird v. Anderson*, 5 T. R. 235, *Meux v. Howell*, 4 East, 1. So also where a debtor, being sued, and insolvent, pending the suit, and before execution, assigned all his effects to trustees for the benefit of all his creditors, under which assignment possession was immediately taken, it was held that this assignment was not fraudulent, though made with intent to delay the plaintiff of his execution. *Pickstock v. Lyster*, 8 M. and S. 371. See the observations of *Richards*, B. 3 Price, 16.

In order to prove the fraud, declarations made by the assignor, at the time of executing the bill of sale, are admissible, as part of the *res gestæ*, but not if made at another time. *Phillips v. Eamer*, 2 Esp. 357, *Penn v. Scholey*, 5 Esp. 243.

Where A. sued out a writ of *fi. fa.* against the goods of B., and the sheriff executed a bill of sale of certain goods to A. after which, B. remaining in possession of the goods, the sheriff again took them under another execution against B., in an action of trover by A. against the sheriff for taking these goods, it was held that the declarations of B. at the time of the second execution were evidence for the defendant, to show that A.'s execution was colourable. *Willies v. Farley*, 3 C. and P. 395.¹

Competency of Witness.

In trespass for taking the plaintiff's goods, where the question was, whether the goods had been assigned to the plaintiff by A., against whom the execution issued, it was held that A. was not a competent witness for the defendant to disprove the assignment, for the object of calling A. being to prove that the execution which had been levied upon the goods to satisfy a debt owing by him, was valid, he was called to give evidence, the effect of which would be to pay his own debt with the plaintiff's goods. *Bland v. Ansley*, 2 N. R. 331.

For taking the Goods of a Tenant in execution without paying the year's rent.

The plaintiff in this action must prove: 1, the demise and the rent arrear; 2, the levy and removal of the goods; 3, notice to the sheriff; 4, the value of the goods seized.

By 8 Anne, c. 14, s. 1, no goods or chattels lying or being in or upon any messuage, lands, or tenements, leased for life or lives, term of years, at will, or otherwise shall be liable to be taken by virtue of any execution, on any pretence whatsoever,

¹ 14 Eng. Com. Law Reps. 366.

unless the party, at whose suit the said execution is sued out, shall before the removal of such goods from off the said premises, by virtue of such execution or extent, pay to the landlord of the premises, or his bailiff, all such sum or sums of money as are due for rent for the said premises, at the time of the taking of such goods and chattels, by virtue of such execution, provided the arrears of rent do not amount to more than one year's rent.

By 11 Geo. IV. cap. 11, the provisions of the statute of Anne are extended to a seizure and sale of goods under the Bishop's extract, upon a *pone per Vadios*, issuing out of the Court of Pleas at Durham. See *Brandling v. Barrington*, 6 B. and C. 467.*

A commissioner of bankruptcy is not an execution within the meaning of this statute. *Ex parte Devisme, Co. B. L. 190. Eden 304, 15 East, 230.* Where the sheriff seizes, after an act of bankruptcy committed by the tenant, he cannot retain a year's rent for the landlord against the assignees, *Lee v. Lopes*, 15 East, 230; but in an action against the sheriff, who has levied under an execution after an act of bankruptcy committed, it is no defence that the tenant has become bankrupt, and that the sheriff is liable to the assignees. *Duck v. Braddyl, M'Cl. 217.*

The trustee of an outstanding satisfied term, in trust to attend the inheritance, is a landlord within the statute. *Colyer v. Speer*, 2 B. and B. 67.¹ So the action may be brought by an executor or administrator. *Palgrave v. Windham*, 1 Str. 212. On a sale of premises it was stipulated that from the time of the vendee taking possession until the completion of the purchase, he should pay to the vendor at the rate of 100*l. per annum*; held that this was rent, and that the sheriff was bound to pay the amount thereof under the statute of Anne. *Saunders v. Musgrave*, 6 B. and C. 524.²

The plaintiff can only recover the rent due at the time of the taking the goods, and not that which accrues after the taking and during the continuance of the sheriff in possession. *Hoskins v. Knight*, 1 M. and S. 245.

Evidence of the demise.] The declaration need not state the particulars of the demise; but if stated they must be proved as laid. *Bristow v. Wright, Dougl. 640.* In order to prove the rent in arrear, it will be sufficient to show the occupation by the tenant, and the amount of the rent, and it is not necessary to call the tenant, in order to prove the state of accounts between the landlord and himself. *Harrison v. Barry*, 7 Price, 690.

Evidence of the levy.] The plaintiff may prove the execution by production of the writ and warrant, which will connect the bailiff and sheriff, see *ante*, p. 483, and by proof of the levy having

* 13 Eng. Com. Law Reps. 238. ¹ 6 Id. 21. ² 13 Id. 243.

been made. It will be sufficient for the plaintiff to prove, that *some* of the goods have been removed. *Colyer v. Spear*, 2 B. and B. 67.*

Evidence of notice.] In order to render the sheriff liable as a wrong doer, by the removal of the goods, it must be proved, that he had notice of the landlord's claim. See *Arnitt v. Garnett*, 3 B. and A. 441 ;* *Smith v. Russell*, 3 Taunt. 400. No specific notice is required by the statute, and if a knowledge of the landlord's claim can be by any means brought home to the defendant, before he has parted with the money raised by the levy, he will be liable. Thus if it appears, that the sale has been conducted with great secrecy and dispatch, it is for the jury to say, whether the sheriff knew of the fact, that the rent was in arrear, though no notice of it had been given to him before the sale. *Andrews v. Dixon*, 3 B. and A. 645.*

Defence.

If the agent of the landlord take from the sheriff's officer an undertaking to pay the year's rent, and consent to the goods being sold, the landlord cannot afterwards maintain an action on the statute, though the rent be not paid pursuant to the undertaking, and though the undertaking be void by the statute of frauds. *Rothery v. Wood*, 3 Campb. 24.

For not paying over Money levied.

In an action for money had and received against a sheriff for not paying over to the plaintiff money levied under an execution in an action at the suit of the plaintiff, the latter must prove the writ of execution, and levy under it.

The writ of execution must be produced; or if it has been returned and filed, an examined copy of it must be given in evidence, or if it be in the hands of the sheriff, a notice to produce must be served, and secondary evidence may then be given. See *post*, p. 491. Though it seems to be doubtful whether this action can be maintained before the return of the writ, see *dictum per Parke, J. Morland v. Pellatt*, 8 B. and C. 727.* The plaintiff must connect the sheriff with the bailiff by proving the warrant, or giving evidence of some act of recognition. See *ante*, p. 483. If the defendant has returned the writ, and that he has levied the sum, an examined copy of the writ and return will be sufficient. *Dale v. Birch*, 3 Campb. 347. It is not sufficient to prove the taking and selling of the goods by a person reputed to be an officer of the sheriff, without proof of the writ of execution or warrant. *Wilson v. Norman*, 1 Esp. 154. The defendant may deduct his poundage. *Longdill v. Jones*, 1 Stark. 346.*

* 6 Eng. Com. Law Reps. 21. * 5 Id. 340. * 5 Id. 410. * 15 Id. 332.

* 2 Id. 420.

For not arresting a Debtor.

In an action against a sheriff for not arresting a debtor when he had an opportunity, the plaintiff must prove: 1, the debt due from the debtor to himself; 2, the issuing of the process and delivery to the defendant; and 3, that the defendant had notice, so that he might have arrested the debtor.

Evidence of debt.] Whatever evidence would be sufficient to charge the debtor in an action brought against him by the plaintiff, will be sufficient, as against the sheriff in this action. *Sloman v. Herne*, 2 Esp. 695, *Gibbon v. Coggon*, 2 Campb. 188, and see post, *Actions for Escape*.

Evidence of issuing of process.] In order to prove the process issued, the plaintiff should produce the writ; or if returned, should give in evidence an examined copy of the writ and return. If it be in the possession of the defendant, a notice to produce should be served. To prove that the writ remains in the possession of the defendant, after the return, search should be made at the Treasury, and upon its appearing not to have been returned, it will be presumed, on proof of delivery to the under-sheriff, that it remains in the defendant's possession, *ante*, p. 7.

Evidence of notice.] If a person against whom the sheriff has a writ does not abscond, but continues in the daily exercise of his usual occupation, appears publicly as usual, and is visible to every person that comes to him on business, and the bailiff neglects to arrest him, and returns *non est inventus*, it is a false return. *Beckford v. Montague*, 2 Esp. 475. It is not, however, sufficient merely to prove, that the debtor was within the defendant's bailiwick; the plaintiff must go further, and prove notice to the under-sheriff in the country, or to the bailiff to whom the warrant was directed; a notice to the town agent of the under-sheriff is not sufficient. *Gibbon v. Coggon*, 2 Campb. 189.

A bound-bailiff is not a competent witness for the defendant to prove that he endeavoured to make the arrest. *Powell v. Haw*, 2 *Ld. Raym.* 1411.

It is no defence that the debtor was arrested the day after the return of the writ. *Barker v. Green*, 2 *Bingh.* 317.*

For Escape on Mesne Process.

In an action against the sheriff for an escape on mesne process, the plaintiff must prove, 1, the debt due from the party arrested; 2, the issuing and delivery of the process to the defendant; 3, the arrest; and 4, the escape.

*9 Eng. Com. Law Reps. 419.

Evidence of the debt due from the party arrested.] The plaintiff must prove a debt due to him from the party arrested, *Alexander v. Macauley*, 4 T. R. 611, at the time of the arrest. *White v. Jones*, 5 Esp. 160. If the declaration state, that the party was indebted to the plaintiff for goods sold and delivered, it must be so proved, *Parker v. Fenn*, 2 Esp. 477 (n); but the exact sum mentioned in the declaration need not be proved. B. N. P. 66. The debt is proved by the same evidence which would have been requisite to establish it, in action against the debtor himself, and therefore an admission of the debt by the debtor at any time before the escape is good evidence against the sheriff. *Williams v. Bridges*, 2 Stark. 42, *Rogers v. Jones*,¹ 7 B. and C. 89."

Evidence of the issuing and delivery of the process to the defendant.] The issuing of the process, and the delivery of it to the under-sheriff, must be proved. If the process has been returned, an examined copy of the writ and return will be evidence of these facts. B. N. P. 66. If not returned, after proof of a notice to produce, and that search has been made at the treasury, secondary evidence will be admitted. Where it was averred that the debtor was arrested "under a writ indorsed for bail by virtue of an affidavit now on record," it was held necessary to prove the affidavit. *Webb v. Herne*, 1 B. and P. 382. But where the declaration stated that the writ was marked for bail "by virtue of an affidavit of the cause of action of the plaintiff in that behalf, before then made, and duly filed of record in this court, according to the form of the statute, &c." without stating by whom the affidavit was made, it was held that the averment was sufficiently proved by an office copy of the affidavit. *Casburn v. Reid*, 2 B. Moore, 60.² A variance between the process stated and that proved will be fatal; but where it was alleged that the prisoner was arrested on mesne process, and brought before a judge at chambers by virtue of a writ of *habeas corpus*, and was by him thereupon committed to the custody of the marshal, "as by the record thereof now remaining in the court of King's Bench appears, &c." it was held, that such allegation was either impertinent and surplusage, since, properly speaking, such documents are not records, or considering them as quasi of record, the allegation was sufficiently proved by the production of them from the office of the clerk of the papers. *Wigley v. Jones*, 5 East, 440, and see *Bevan v. Jones*, 4 B. and C. 403,³ *Bromfield v. Jones*, 4 B. and C. 380,⁴ ante, p. 49.

Evidence of the arrest.] The facts sufficient to constitute an arrest have already been noticed, ante, p. 376; and see post, 492. Where the plaintiff gave in evidence the sheriff's return of *cepi corpus* to the writ, and proved that the defendant in the former

¹ 3 Eng. Com. Law Reps. 235. ² 14 Id. 19. ³ 4 Id. 45. ⁴ 10 Id. 369.
⁵ 10 Id. 362.

action did not put in bail above, and was not in the sheriff's custody at the return of the writ, Lord Ellenborough held, that the arrest and escape were sufficiently proved by the sheriff's return, and the non-appearance of the party, according to the exigency of the writ. *Fairlie v. Birch*, 3 Campb. 397. Where the writ has not been returned, evidence must be given to connect the bailiff and the sheriff. See *ante*, p. 483.

Evidence of the escape.] That the debtor was seen abroad after the return of the writ, and that bail has not been put in, will be evidence of an escape, *vide supra*. An admission of the escape by the under-sheriff, is evidence against the sheriff, *ante*, p. 484. The party escaping may be called to prove a voluntary escape, *B. N. P.* 67, for though the whole debt may be recovered against the sheriff, yet in an action against the original debtor for the debt, he can neither plead in bar nor give in evidence in reduction of damages, the judgment obtained in the action against the sheriff. *Per Abbott, C. J., Hunter v. King*, 4 B. and A. 210.

Defence.

It is a good defence, under the general issue, that the defendant, though he has taken no bail-bond, has put in bail before the expiration of the rule to bring in the body. *Pariente v. Plumtree*, 2 B. and P. 35.

For Escape in Execution.

In an action against the sheriff, for suffering a prisoner in execution to escape, the plaintiff must prove: 1, the judgment; 2, the issuing, and delivery to the defendant, of the writ of *ca. sa.*; 3, the arrest; and 4, the escape.

The mode of proving the judgment, *ante*, p. 54, and the issuing and delivery of the writ, *ante*, p. 491, has already been mentioned.

Evidence of arrest.] The officer must be the authority to arrest, but need not be the hand that arrests; nor in the presence of the person arrested; nor actually in sight; nor is any exact distance prescribed. It would be a different case, if he be upon some other errand, or stay at home and send a third person to make the arrest. *Per Ld. Mansfield, Blatch v. Archer*, Cowp. 65. In that case, the son of the officer said, at the time of the arrest, that he had his authority in his pocket, the officer himself being at the distance of thirty rods, and not in sight, and it was held a good arrest; and see *supra*. If A. be in custody at the suit of B., and a writ be de-

livered to the sheriff at the suit of D. the delivery of the writ is an arrest in law, and if A. escape, D. may bring debt against the sheriff for an escape. *B. N. P. 66.*

It must appear that the prisoner was in the custody of the defendant; and, therefore, where he was taken in execution by a former sheriff, the assignment of the prisoner from him to the defendant by indenture ought to be proved, *Davidson v. Seymour*, 1 *M. and M.* 34, unless the defendant has become sheriff on the death of his predecessor; in which case he is bound, at his peril, to take notice of all the executions which are against any persons whom he finds in the gaols. *Westley's case*, 3 *Rep.* 72, *b.* *B. N. P. 68.*

Evidence of the escape.] Wherever the prisoner in execution is in a different custody from that which is likely to enforce payment of the debt, it is an escape. *Per Buller, J., Benton v. Sutton*, 1 *B. and P.* 27. Thus if a sheriff's officer having taken a prisoner in execution, permit him to go in company with one of his followers to his own house, for the purpose of settling his affairs, it is an escape. *Ibid.* If the defendant, when taken in execution, is seen at large for ever so short a time, either before or after the return of the writ, it is an escape. *Per De Grey, C. J., Hawkins v. Plomer*, 2 *W. Bl.* 1049. If the bailiff of a liberty, who has the return and execution of writs, removes a prisoner, taken in execution, to the county gaol, situate out of the liberty, and there delivers him into the custody of the sheriff, it is an escape, for which the bailiff is liable. *Boothman v. Earl of Surrey*, 2 *T. R.* 5. Where the officer, having taken the party in execution, permitted him to go to a lock-up house, kept by another officer, not named in the warrant, where he remained fourteen days, before the return of the writ, it was held no escape. *Houlditch v. Birch*, 4 *Taunt.* 608. Under a count for a voluntary escape the plaintiff may give evidence of a negligent escape. *Bonafous v. Walker*, 2 *T. R.* 126. If the sheriff receive the sum indorsed on the writ from the prisoner, and before payment over to the plaintiff, liberate him, it is an escape. *Slackford v. Austin*, 14 *East*, 468, 4 *B. and C.* 31.*

By stat. 8 and 9 *W. III.*, c. 27, s. 8, if the marshal of the King's Bench, or warden of the Fleet, or their respective deputy or deputies, or other keeper or keepers, of any other prison or prisons, shall, after one day's notice in writing given for that purpose, refuse to show any prisoner, committed in execution, to the creditor, at whose suit such prisoner was committed or charged, or to his attorney, every such refusal shall be adjudged an escape in law. And by section 9, if any person or persons, desiring to charge any person with any action or execution, shall desire to be informed by the said marshal or warden, or their respective deputy or deputies, or

by any other keeper of any other prison, whether such person be a prisoner in his custody or not, the said marshal or warden, or such other keeper of any other prison, shall give a true note in writing thereof, to the person so requesting the same, or to his lawful attorney, upon demand at his office for that purpose, or in default thereof shall forfeit the sum of 50*l.*; and if such marshal, &c. shall give a note in writing that such person is an actual prisoner in his or their custody, every such note shall be accepted and taken as a sufficient evidence that such person was at that time a prisoner in actual custody.

Defence.

The defendant cannot, under *nil debet*, give in evidence a retaking of the prisoner on fresh pursuit, before the commencement of the action; for by statute 8 and 9 W. III. c. 27, s. 6, no retaking on fresh pursuit shall be given in evidence, on the trial of any issue in an action of escape, unless the same be specially pleaded; nor shall any special plea be allowed without an oath by the defendant, that the prisoner escaped without his consent, privity, or knowledge. Where the defendant pleaded that the prisoner returned into his custody, and that he did thereupon, then and afterwards, keep and detain the said prisoner in his custody, &c., and the plaintiff traversed that after the prisoner's return the defendant did keep and detain him in custody, &c., in manner and form as stated in the plea, it was held that the plea was negatived by evidence, that after the prisoner's return he again escaped, and died out of custody. *Chambers v. Jones*, 11 *East*, 406. If the defendant plead *no escape*, he cannot give in evidence no arrest, for he admits an arrest by his plea. *B. N. P.* 67.

If the prison take fire, or be broken open by the king's enemies, by means whereof the prisoners escape, this will excuse the sheriff; but it is otherwise if the prison be broken open by the king's subjects. *B. N. P.* 66. So he may show, under the general issue, that the escape was by the fraud and covin of the party really interested in the judgment. *Hiscocks v. Jones, Esq.*, 1 *M. and M.* 269.

The defendant may show that the judgment against the prisoner was void, but not that it was erroneous; thus he may show that the judgment was given in an inferior court, in debt on a bond made *extra jurisdictionem*, for such a judgment is void. *B. N. P.* 65, 66. *Watson on Sheriffs*, 54. So if the writ of execution be absolutely void, the sheriff will not be liable for an escape, but it is otherwise when it is only erroneous. *Weaver v. Clifford, Cro. Jac.* 3. *Burton v. Eyre, id.* 288. *B. N. P.* 66.

For taking insufficient Pledges in replevin.

In an action on a case against a sheriff, for taking insufficient pledges in replevin, the plaintiff must prove, 1, the taking of the distress; 2, the replevying of the distress by the sheriff, and the proceeding in the replevin; 3, the taking of the bond; 4, the insufficiency of the sureties.

Evidence of the replevying.] The replevying of the distress may be proved by the original precept to deliver. If it be in the hands of the bailiff, he should be served with a *subpœna duces tecum*; if it be returned to the sheriff, a notice to produce should be given to let in secondary evidence. The connexion between the sheriff and the bailiff delivering may also be proved by showing that the sheriff has recognised the bailiff's act.

Evidence of the taking of the bond.] Notice to produce the bond should be given to the defendant. Where it was produced under such notice, and it also appeared, that upon enquiry made on behalf of the plaintiffs, whether any replevin bond had been executed, the original bond had been shown to the plaintiffs' agent, and a copy of it delivered to him, Abbott, C. J., was of opinion that, under these circumstances, it was unnecessary to call the subscribing witness, and that as against the sheriff it must be taken to be a valid bond. *Scott v. Waithman*, 3 Stark. 168. So where it was proved that the sheriff had assigned the bond to the plaintiff, Abbott, C. J., was of opinion that it was not necessary for the plaintiff to prove the execution by the sureties, for that as against the sheriff, proof of the assignment by him to the plaintiff was sufficient. *Barnes v. Lucas, R. and M.* 264.

Evidence of the insufficiency of the sureties.] Some evidence must be given by the plaintiff of the insufficiency of the sureties; but it is said that very slight evidence is sufficient to throw the proof on the sheriff, for the sureties are known to him, and he is to take care that they are sufficient. *Saunders v. Darling, B. N. P.* 60. Where the sureties had recently been bankrupt, but were in apparent credit when the bond was taken, it was held that the sheriff was not liable. *Hindle v. Blades*, 5 Taunt. 225.^a If a person, known to the sheriff, make inquiries as to the credit or reputation of a tradesman, and the value of his stock, and to communicate the result of such inquiry to the sheriff, if it be favourable, the latter need not make a personal inquiry. *Per Dallas, C. J., Sutton v. Waite*, 8 B. Moore, 28.^b Though the sheriff is justified in taking a person as a surety, who appears to the world to be a per-

^a 1 Eng. Com. Law Reps. 86. ^b 17 Id. 96.

son of responsibility, yet if he actually know that the party is not responsible, or if, having the means in his power of informing himself upon the subject, he neglect to use them, then, notwithstanding appearances, he is responsible, in the event of the surety being really insufficient. *Per Abbott, C. J., Scott v. Waithman*, 3 Stark. 170.* In order to prove the insufficiency, evidence may be given that applications have been made to the surety for money by different creditors, at different times, which he was unable to pay, and that he had repeatedly broken his promises to pay. *Gwyllim v. Scholey*, 6 Esp. 100. The sureties in the bond may be witnesses to prove whether they were sufficient or not. 1 Saund. 195, g (π). *Hindle v. Blades*, 5 Taunt. 225.*

The sheriff is only liable to the extent to which the sureties themselves are liable, viz. double the value of the goods distrained. *Evans v. Brander*, 2 H. Bl. 547. *Baker v. Garratt*, 3 Bingh. 59.*

For a false Return.

In an action against a sheriff for a false return, the plaintiff must prove, 1, the cause of action, or judgment as stated in the declaration; 2, the writ and the return; 3, the falsehood of the return.

The mode of proving the cause of action, *ante*, p. 491; the judgment, *ante*, p. 54; and the writ and return, *ante*, p. 491, has been already stated.

Evidence to disprove the return.] The plaintiff must prove the falsehood of the return. Thus in an action for a false return of *non est inventus*, he may show that the party against whom the writ issued was publicly following his usual avocations. *Beckford v. Montague*, 2 Esp. 475, *ante*, p. 490. So in an action for a false return of *nulla bona*, to a *fi. fa.* he must show that the party had goods within the bailiwick, of which the sheriff had notice, or might, by using due diligence, have had notice. In an action for a false return of *nulla bona* to a *fi. fa.* against the goods of A. and B., the plaintiff must have a verdict, if he prove that A. only had goods. *Jones v. Clayton*, 4 M. and S. 349.

Defence.

In an action for a false return of *nulla bona* to a writ of *fi. fa.*, the defendant may show that the party against whom the writ issued has become bankrupt, and that a commission has issued against him, in which case the bankruptcy must be regularly proved. *B. N. P.* 41; and see *Dowden v. Fowle*, 4 Campb. 38, *supra*. So the defendant may show that he paid the money levied to the landlord, under 8 Anne, c. 14, for arrears of rent; but in such case

* 14 Eng. Com. Law Reps. 176. * 1 Id. 86. * 11 Id. 27.

some evidence, though slight, must be given of the rent being due, and the landlord cannot be called for this purpose; for, if the plaintiff succeed, the witness would be liable to an action at the suit of the sheriff, in which this judgment would be evidence of special damage. *Keightley v. Birch*, 3 *Campb.* 521. Where the sheriff returned *nulla bona* after satisfying the landlord's claim for rent, and the king's taxes, and the plaintiff assented to his quitting possession of the premises, and sued out a *ca. sa.*, it was held that he could not afterwards maintain an action for a false return to the *fi. fa.*, however unfounded the claim for rent might turn out to be. *Stuart v. Whitaker, R. and M.* 310. So where to a *fi. fa.* for 301l. the sheriff returned that he had levied only 13l., which the plaintiff accepted, Abbott, C. J., held, that by such acceptance the plaintiff had waived all further claim against the sheriff. *Benyon v. Garratt*, 1 *C. and P.* 154.¹

The defendant may show that the judgment on which the writ issued was fraudulent and void, *ante*, p. 494. *Penn v. Scholey*, 5 *Esp.* 243; and see *Tyler v. Duke of Leeds*, 2 *Stark.* 221.²

Where the defence is, that the goods in question have been assigned before the execution, the plaintiff, in reply, may show the assignment fraudulent. *Dewey v. Bayntun*, 6 *East*, 257. Where the sheriff relied upon a previous judgment and execution, under which he had levied, Abbott, C. J., was of opinion that, in an action for a false return against him (he not being indemnified,) it was not competent to the plaintiff to show that the other judgment and execution were fraudulent and void; but, upon its being suggested that Lord Kenyon had permitted such evidence to be given, *Kempland v. Macauley, Peake*, 65, he received the evidence, with liberty to the defendant to move to enter a nonsuit in case a verdict should be found for the plaintiffs. *Wormall v. Young*, 5 *B. and C.* 661.³

The defendant cannot give in evidence, even in mitigation of damages, an inquisition held by him to inquire into the property of the goods. *Glossop v. Pole*, 3 *M. and S.* 175.

A person who has forcibly taken the goods out of the hands of the sheriff, is competent to prove his own property in them, for the sheriff cannot maintain an action against him for the rescue, after having returned *nulla bona*. *Thomas v. Pearse*, 5 *Price*, 547. And the assistant to a sheriff's officer, who has been left in possession under an execution, is a competent witness for the sheriff, for the judgment would not be evidence either for or against the witness. *Clark v. Lucas*, 1 *C. and P.* 156.⁴ *R. and M.* 32.

¹ 11 Eng. Com. Law Reps. 351. ² 3 Id. 322. ³ 12 Id. 347. ⁴ 11 Id. 363.

For Extortion.

In an action against the sheriff for extortion, the plaintiff must prove, 1, the judgment, if stated; 2, the *fi. fa.*, or other writ; 3, the connexion between the sheriff and the bailiff; and, 4, the extortion.

In debt on 28 Eliz. c. 4, for extortion in executing a *fi. fa.*, if the plaintiff state the judgment in his declaration, and that execution was sued out on the *said* judgment, it must be proved. *Savage v. Smith*, 2 *W. Bl.* 1101, 5 *T. R.* 498. If the statute 28 Eliz. c. 4, be recited as 29 Eliz., it is a fatal variance. *Rumsey v. Taffnell*, 2 *Bingh.* 255.¹

The mode in which the issuing of the *fi. fa.*, *ante*, p. 491, and the connexion between the sheriff and the bailiff, *ante* p. 483, may be proved, has been already stated. If the sheriff has returned to the writ, that he has caused to be levied, &c., it will be evidence that he has adopted the act of the bailiff as his own. *Woodgate v. Knatchbull*, 2 *T. R.* 154. It must appear that the sheriff entrusted the bailiff with his authority in the particular case in which the latter has abused it, and therefore, if the extortion be committed by an officer not named in the warrant, to whose house the party had been carried, the sheriff is not liable. *George v. Perring*, 4 *Esp.* 63.

Where the money levied is not sufficient to satisfy the plaintiff's claim, the retaining of any part which ought to be paid over to the plaintiff, is an indirect receiving or taking from him within the statute, 28 Eliz. c. 4. *Buckle v. Bewes*, 3 *B. and C.* 688.¹

In an action against a sheriff's officer, on 32 Geo. II. c. 29, the plaintiff must prove a table of fees allowed by the justices. *Jaques v. Whitcombe*, 1 *Esp.* 361. *Martin v. Slade*, 2 *N. R.* 59. *Martin v. Bell*, 1 *Stark.* 417.²

ACTIONS AGAINST HUNDREDORS, &c.

THE statutes of Winton, the Riot act, the Black act, and other statutes relating to remedies against the hundred, have been repealed by 7 and 8 Geo. IV. c. 27, and their provisions have been partially restored, with considerable amendments, by 7 and 8 Geo. IV. c. 31. This last statute took effect on the 1st of July, 1827. The following are the only clauses of it that can be applicable to the purpose of the present work.

"Whereas it is expedient that the several statutes now in force in that part of the United Kingdom called England, relative to remedies against the hundred for the damage occasioned by persons

¹ 9 Eng. Com. Law Reps. 404. ² 10 Id. 214. ³ 2 Id. 449.

riotously and tumultuously assembled, should be amended, and consolidated into one act; and with that view the said statutes are, by an act of the present session of parliament, repealed, from and after the last day of June in the present year, except as to offences and other matters committed or done before or upon that day: be it therefore enacted by the king's most excellent majesty, by and with the advice and consent of the lord's spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that this act shall commence on the first day of July in the present year.

"II. And be it enacted, that if any church or chapel, or any chapel for the religious worship of persons dissenting from the united church of England and Ireland, duly registered or recorded, or any house, stable, coach-house, outhouse, warehouse, office, shop, mill, malthouse, hop-oast, barn, or granary, or any building or erection used in carrying on any trade or manufacture, or branch thereof, or any machinery, whether fixed or moveable, prepared for or employed in any manufacture, or in any branch thereof, or any steam engine or other engine, for sinking, draining, or working any mine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, waggon-way, or trunk for conveying minerals from any mine, shall be feloniously demolished, pulled down, or destroyed, wholly or in any part, by any persons riotously and tumultuously assembled together, in every such case the inhabitants of the hundred, wapentake, ward, or other district in the nature of a hundred, by whatever name it shall be denominated, in which any of the said offences shall be committed, shall be liable to yield full compensation to the person or persons damnified by the offence, not only for the damage so done to any of the subjects herein-before enumerated, but also for any damage which may at the same time be done by any such offenders to any fixture, furniture, or goods whatever, in any such church, chapel, house, or other of the buildings or erections aforesaid.

"III. Provided always, and be it enacted, that no action or summary proceeding, as hereinafter mentioned, shall be maintainable by virtue of this act, for the damage caused by any of the said offences, unless the person or persons damnified, or such of them as shall have knowledge of the circumstances of the offence, or the servant or servants who had the care of the property damaged, shall within seven days after the commission of the offence, go before some justice of the peace residing near and having jurisdiction over the place where the offence shall have been committed, and shall state upon oath before such justice the names of the offenders, if known, and shall submit to the examination of such justice touching the circumstances of the offence, and become bound by recognizance before him to prosecute the offenders when apprehended; provided

also, that no person shall be enabled to bring any such action, unless he shall commence the same within three calendar months after the commission of the offence.

"IV. And be it enacted, that no process for appearance in any action to be brought by virtue of this act against any hundred or other like district, shall be served on any inhabitant thereof, except on the high constable, or some one of the two constables (if there be more than one), who shall, within seven days after such service, give notice thereof to two justices of the peace of the county, riding, or division in which such hundred or district shall be situate, residing in or acting for the hundred or district; and such high constable is hereby empowered to cause to be entered an appearance in the said action, and also to defend the same, on behalf of the inhabitants of the hundred or district, as he shall be advised; or, instead of defending the same, it shall be lawful for him, with the consent and approbation of such justices, to suffer judgment to go by default; and the person upon whom, as high constable, the process in the action shall be served, shall, notwithstanding the expiration of his office, continue to act for all the purposes of this act, until the termination of all proceedings in and consequent upon such action; but if such person shall die before such termination, the succeeding high constable shall act in his stead.

"V. And be it enacted, that in an action to be brought by virtue of this act against the inhabitants of any hundred or other like district, or against the inhabitants of any county of a city or town, or of any such liberty, franchise, city, town, or place, as is herein-after mentioned, no inhabitant thereof shall, by reason of any interest arising from such inhabitancy, be exempted or precluded from giving evidence either for the plaintiff or for the defendants.

* * * *

"VIII. And whereas it is expedient to provide a summary mode of proceeding where the damage is of small amount; be it therefore enacted that it shall not be lawful for any person to commence any action against the inhabitants of any hundred or other like district, where the damage alleged to have been sustained by reason of any of the offences in this act mentioned shall not exceed the sum of thirty pounds.

* * * *

"X. And be it enacted, that if any high constable shall refuse or neglect to exhibit or give such notice as is required in any of the cases aforesaid, it shall be lawful for the party damnified to sue him for the amount of the damage sustained, such amount to be recovered by an action on the case, together with full costs of suit.

"XI. And be it enacted, that every action or summary claim,

to recover compensation for the damage caused to any church or chapel by any of the offences in this act mentioned, shall be brought in the name of the rector, vicar, or curate of such church or chapel, or in case there be no rector, vicar, or curate, then in the names of the church or chapelwardens, if there be any such; and if not, in the name or names of any one or more of the persons in whom the property of such chapel may be vested; and the amount recovered in any such case shall be applied in the rebuilding or repairing such church or chapel; and where any of the offences in this act mentioned shall be committed on any property belonging to a body corporate, such body may recover compensation against the hundred or other like district, in the same manner, and subject to the same conditions, as any person damnified is by this act enabled to do; provided always, that the several conditions which are hereinbefore required to be performed by or on behalf of any person damnified, may, in the case of a body corporate, be performed by any officer of such body on behalf thereof.

“XII. And whereas the offences for which compensation is granted by virtue of this act may be committed in counties of cities and towns, or in such liberties, franchises, cities, towns, and places, as either do not contribute at all to the payment of any county rate, or contribute thereto, but not as being part of any hundred or other like district; and it is expedient to provide for all such cases; be it therefore enacted, that where any of the offences in this act mentioned shall be committed in a county of a city or town, or in any such liberty, franchise, city, town, or place, the inhabitants thereof shall be liable to yield compensation in the same manner, and under the same conditions and restrictions in all respects, as the inhabitants of the hundred; and every thing in this act in any way relating to a hundred, or to the inhabitants thereof, shall equally apply to every county of a city or town, and to every such liberty, franchise, city, town, and place, and to the inhabitants thereof; and where the justices of the peace of the court, riding, or division, are excluded from holding jurisdiction in any such liberty, franchise, city, town, or place, in every such case all the powers, authorities, and duties by this act given to or imposed on such justices, shall be exercised and performed by the justices of the peace of the liberty, franchise, city, town, or place in which the offence shall be committed; and where the offence shall be committed in a county of a city or town, all the like powers, authorities, and duties shall be exercised and performed by the justices of the peace of such county of a city or town; and in every action to be brought or summary claim to be preferred under this act against the inhabitants of a county of a city or town, or of any such liberty, franchise, city, town, or place, the process for appearance

in the action, and the notice required in the case of the claim, shall be served upon some one peace officer of such county, liberty, franchise, city, town, or place; and all matters which by this act the high constable of a hundred is authorized or required to do in either of such cases, shall be done by the peace officer so served, who shall have the same powers, rights, and remedies, as such high constable has by virtue of this act, and shall be subject to the same liabilities; and shall, notwithstanding the expiration of his office, continue to act for all the purposes of this act until the termination of all proceedings in and consequent upon such action or claim; but if he shall die before such termination, his successor shall act in his stead."

From the above extract it will appear, that the remedy given by the statute of Winton against the hundred, in the case of robbery, and by the Black act in the case of certain malicious injuries to property, unaccompanied by riot, is abolished.

On the issue *Not guilty*, the plaintiff must be prepared to prove. 1, his interest in the property injured; 2, the offence; 3, that it was committed within the hundred, &c.; 4, the examination of himself or servant, agreeably to the statute; 5, the recognizance to prosecute; 6, the amount of damage; 7, the commencement of the action within three calendar months.

The cases cited hereafter are all decisions on the old statutes, and are only inserted where they seem applicable to the recent act.

Interest of the plaintiff.] The bare trustee of a satisfied term is entitled to sue for damages. *Pritchett v. Waldron*, 5 T. R. 14.—(Riot act.) Parties jointly interested in the property may join in the action. *Winterstoke Hundred's case*, Dy. 370, a.—(Stat. Winton.) Where the property injured consists of a church or chapel, or belongs to a corporation, the 11th section of the act points out the parties who are to sue. A reversioner may sue for the damage sustained by him. *Pellew v. Inhab. of Wonford*, 9 B. and C. 134;—though the hundred may thereby be subjected to several actions. S. C. 142.—(Black act.)

The offence.] By 7 and 8 Geo. IV. c. 30, s. 8, it is enacted that "if any persons riotously and tumultuously assembled together to the disturbance of the public peace, shall unlawfully and with force demolish, pull down, or destroy, or begin to pull down, demolish, or destroy any church or chapel, or any chapel for the religious worship of persons dissenting from the united church of England and Ireland, duly registered or recorded; or any house, sta-

ble, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn, or granary, or any building or erection used in carrying on any trade or manufacture, or any branch thereof; or any machinery, whether fixed or moveable, prepared for or employed in any manufacture, or any branch thereof; or any steam-engine, or other engine for sinking, draining, or working any mine; or any staith, building, or erection used in conducting the business of any mine; or any bridge, waggon-way, or trunk for conveying minerals from any mine; every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon."

As this section corresponds almost verbally with the section of 7 and 8 Geo. 4, c. 31, which gives the action against the hundred, it is presumed that, in order to entitle the party to that remedy, the offence must be a felony within the above clause. *See Reid v. Clarke*, 7 T. R. 496.—(Riot act.) The 38th section of 57 Geo. III. c. 19, which extended the remedy to all cases of injury to buildings by rioters, is repealed by 7 and 8 Geo. IV. c. 27; so that where the injury is partial it will be matter of inquiry (as formerly under the riot act) whether the acts of the rioters constitute a "beginning to demolish" within the above clause. The following cases were decided on the riot act.

Where a riotous mob broke the windows, sashes, and shutters of a house, in order to compel the occupier to illuminate, this was held not within the act. *Reid v. Clarke*, *supra*. It is a question for the jury, whether the rioters intended to stop short of demolition, or to proceed to further acts to effect their purpose. *Burrows v. Wright*, 1 East, 615. During the riots respecting the corn bill, the mob attacked the plaintiff's house, and proceeded to break his windows, shutters, fanlight over his door, &c., when the military appeared and dispersed them: held sufficient evidence of a beginning to demolish. *Sampson v. Chambers*, 4 Campb. 221. On the same occasion, where the mob voluntarily retired after doing similar mischief to the plaintiff's house, the jury, under the direction of Lord Ellenborough, found for the defendants. *Lord King v. Chambers*, *ib.* 377. A mob attacked the plaintiff's house, with intent to liberate a comrade in custody there, and did many acts of violence to the property: *per* Lord Ellenborough—"The question is, what was the purpose of the mob, and whether, if they could not have rescued their leader, they would not have proceeded to demolish the house, as they threatened, unless his escape had intervened. It is a principle of law, that a person intends to do that which is the natural effect of what he does. If, therefore, the pulling down the house was intended as a means of getting at him, they intended to demolish the house." *Beckwith v. Wood*, 2 Stark. 263. See also *Holt's N. P. C.* 203.

On the 57 Geo. III. c. 19, where the words are "house, shop, or other building whatever," the court of King's Bench held that hustings, erected to take the poll at elections, were not within the description. *Allen v. Ayre*, 3 D. and R. 96.

Committed within the hundred, &c.] The offence must be proved to have been committed within the hundred, or other district or place named in the declaration, and which must be one of the different classes of places enumerated in the 2d or 12th sections. Where a distinct hundred is called the "half hundred" or "upper hundred" of A., and the action is brought against the "hundred of A.," the plaintiff must be non-suited. 2 *Saund. (Williams's)* 375, b. n. (3), citing *Constable's case*, Hob. 246.—(Stat. Winton.) But if the half hundred of A. be in fact only part of hundred A., the defendant must plead in abatement. *Ibid.*

Examination of party, &c.] See s. 3, of stat. *supra*. The seven days ought, it seems, to be reckoned exclusively of the day on which the offence was committed. *Pellw v. Inh. Wonford*, 9 B. and C. 134.^a (Black act). The words of the black act, 9 Geo. I. c. 22, differ slightly from those of the above statute, and are as follow:—"No person or persons shall be enabled to recover, &c. unless he or they shall within four days, &c. give in his, her, or their examination upon oath, or the examination upon oath of his, her, or their servant or servants that had the care of his or their houses, &c." On this clause it has been decided, that where the premises injured are under the care of several servants, they should *all* be examined. *Duke of Somerset v. Hundred Mere*, 4 B. and C. 167.^r Where a tenant quitted the premises during the hay harvest, and the steward of lessor, living at a distance, directed certain persons to get in the hay, who took possession of the farm for this purpose, and carried on their work under the superintendence of an under-steward, held that these latter, and not the steward, were the persons to be examined. *S. C. ibid.* Where the reversioner sued, his own oath was held sufficient, without examining the tenant or his servants. *Pellw v. Hundred Wonford*, *supra*. It is unnecessary to examine both servants and owner; if the latter is in residence, or is only casually absent for a short time, his oath is enough; but where he has no superintendence, and has left the house in the charge of servants, the latter are the proper persons to be examined. *Rolfe v. Hund. Elthorne*, 1 M. and M. 185. On the similar clause of 52 Geo. III. c. 180, s. 4, it was ruled that, where the premises demolished belonged to several partners, all, who were present at the transaction, ought to have been examined; or the affidavit of the one examined should at least negative that the rest had any knowledge of the offenders.

Nesham v. Armstrong, 1 B. and A. 146. It may be inferred from this case, and from the dictum of Holyrod J., in *Duke of Somerset v. Hund. Mere*, that the examination of *all* the owners, or *all* the servants, was not necessary under the former statutes, where the persons omitted were shown to be ignorant of the subject matter of inquiry. If so, the introduction of the words in the recent statute, viz.—“or such of them as shall have knowledge of the circumstances of the offence,” makes no material difference in its construction.

In the stat. 27 Eliz. c. 13, (Hue and Cry,) the examination is to be before a “justice of the peace of the county inhabiting within the hundred, or near unto the same.” Under this, it has been decided, that though the examining justice lived several miles off, and there were many others living nearer, it was sufficient; the act being only directory in that respect. *Lake v. Hund. Croydon*, B. N. P. 186. It was also held no objection that the examination took place out of the jurisdiction by a justice, who was usually commorant with his family within the jurisdiction. *Helier v. Hundred Benhurst*, Cro. Car. 211. It must be observed, however, that the words of the recent act are not exactly similar to those of stat. Eliz.

Under the Black Act it was held that the plaintiff was not bound in his examination to state his *suspicion* respecting the offender. *Pellew v. Hundred Wonford*, *supra*. It is unnecessary for the justices of the peace to take the examination in writing; it is sufficient for him to appear at the trial, and depose the substance of the affidavit, *Graham v. Hundred Becontree*, B. N. P. 186, (stat. 27 Eliz.) But if the affidavit be in writing, no other evidence of the examination shall be admitted. *Ibid*. Proof that the person who took the examination was acting as a justice of the peace, is sufficient, and the affidavit may be read on proof that it was delivered to the person producing it by the justice's clerk without proving his hand-writing. Per Parker C. J., *ibid*.

Amount of damage.] The statute entitles the plaintiff to recover compensation for damage done at the same time by the rioters to any fixture, furniture, or goods whatever, in the buildings or erections therein named, s. 3. Neither the Riot nor the Black Act contained any express provision of this kind. Yet where the injury done to personal property was the immediate effect of the act of demolition, or if the destruction of furniture, &c. and the demolition of the building were part of the same riotous transaction, and done at the same time, the plaintiff was allowed to include the whole in his damages. *Hyde v. Cogan*, Dougl. 699. (Riot Act). So where in pulling down a house damage was done to the garden appurtenant, *Wilmot v. Horton*, *ibid*. 701 (n). So where the rioters broke into a flour seller's house and damaged the flour in the course of demo-

lishing the house. *Greasley v. Higginbottom*, 1 East, 636. But where a distinct and substantive offence was committed by some of the mob, as where the flour (in the last case) was stolen, or compulsorily parted with by the dealer at an under price; or where money, plate, &c. were missing after the riot, *Smith v. Bolton*, Holt, N. P. 201; or where the mob broke into a gunmaker's, and carried away the arms for their own use, *Beckwith v. Wood*, 1 B. and A. 487; in these cases the hundred was held not liable. And such, it is apprehended, still continues to be the law, notwithstanding the words of additional liability inserted in the present act.

Where the damage, alleged to have been sustained, does not exceed 30*l.* no action lies, *see s. 8.*

Commencement of the action.] Where the commencement of the action does not appear by the record to have been within three calendar months, the plaintiff must produce a copy of the original, 2 *Saund.* 375, *a. n.* (3). In *Norris v. Hundred Gantry*, *Hob.* 139 (stat. Winton), the day of committing the offence was included in the computation. But this seems at variance with the later case of *Pellew v. Wonford*, 9 B. and C. 134.*

Competency of witnesses.] Inhabitants of the hundred, district, &c. are not exempted or precluded from giving evidence on either side (sect. 5).

* 17 Eng. Com. Law Reps. 343.

APPENDIX.—No. I.

Bill of Exceptions.

SEPARATE from the record, as to the effect of evidence, in K. B. (Tidd's Forms, 373, 5th edit.)

— to wit. Be it remembered, that in the term of —, in the — year of the reign of our sovereign lord *George the Third*, now king of the united kingdom of *Great Britain and Ireland, &c.* came *A. B.* by — his attorney, into the court of our said lord the king before the king himself at *Westminster*, and impleaded *C. D.* in a certain plea of trespass on the case upon promises; on which the said *A. B.* declared against him that, &c. (*set out the declaration and other pleadings, proceed as follows:*) And thereupon issue was joined between the said *A. B.* and the said *C. D.* And afterwards, to wit, at the sittings of *nisi prius*, holden at the *Guildhall* of the city of *London* aforesaid, in and for the said city, on — the — day of — in the — year of the reign of our said lord the king, before the right honourable *Edward Lord Ellenborough*, chief-justice of our said lord the king, assigned to hold pleas in the court of our said lord the king before the king himself, *Edward Law*, Esquire being associated unto the said chief-justice, according to the form of the statute in such case made and provided, the aforesaid issue so joined between the said parties as aforesaid, came on to be tried by a jury of the city of *London* aforesaid, for that purpose duly impanelled, that is to say, *E. F.* of — and *G. H.* of —, &c. (*names and additions of jury*), good and lawful men of the said city of *London*: at which day, came there as well the said *A. B.* as the said *C. D.* by their respective attornies aforesaid; and the jurors of the jury aforesaid, impanelled to try the said issue, being called, also came, and were then and there in due manner chosen and sworn to try the same issue: and upon the trial of that issue, the counsel learned in the law for the said *A. B.* to maintain and prove the said issue on his part, gave in evidence, that, &c. (*here set out the evidence on the part of the plaintiff, and afterwards that on the part of the defendant, and then proceed as follows:*) Whereupon the said counsel for the said *C. D.* did then and there insist before the said chief-justice on the behalf of the said *C. D.* that the said several matters so produced and given in evidence on the part of the said *C. D.* as aforesaid, were sufficient, and ought to be admitted and allowed as

decisive evidence, to entitle the said *C. D.* to a verdict, and to bar the said *A. B.* of his action aforesaid; and the said counsel for the said *C. D.* did then and there pray the said chief-justice, to admit and allow the said matters so produced and given in evidence for the said *C. D.* to be conclusive evidence in favour of the said *C. D.* to entitle him to a verdict in this cause, and to bar the said *A. B.* of his action aforesaid: But to this the counsel learned in the law of the said *A. B.* did then and there insist before the said chief-justice, that the same were not sufficient, nor ought to be admitted or allowed to entitle the said *C. D.* to a verdict, or to bar the said *A. B.* of his action aforesaid; and the said chief-justice did then and there declare, and deliver his opinion to the jury aforesaid, that the said several matters so produced and given in evidence on the part of the said *C. D.* were not sufficient to bar the said *A. B.* of his action aforesaid, and with that direction left the same to the said jury; and the jury aforesaid then and there gave their verdict for the said *A. B.* and — *l.* damages; whereupon the said counsel for the said *C. D.* did then and there, on the behalf of the said *C. D.* except to the aforesaid opinion of the said chief-justice, and insisted on the said several matters, as an absolute bar to the said action: And inasmuch as the said several matters so produced and given in evidence on the part of the said *C. D.* and by his counsel aforesaid objected and insisted on as a bar to the action aforesaid, do not appear by the record of the verdict aforesaid, the said counsel for the said *C. D.* did then and there propose their aforesaid exception to the opinion of the said chief-justice, and requested him to put his seal to this bill of exceptions, containing the said several matters so produced and given in evidence on the part of the said *C. D.* as aforesaid, according to the form of the statute in such case made and provided; And thereupon the said chief-justice, at the request of the said counsel for the said *C. D.* did put his seal to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided, on the said — day of —, in the — year of the reign of his present majesty.

Bill of exceptions to be tacked to the record, as to a witness's being bound to answer a question tending to disgrace him, in K. B. (Tidd's Forms, 375.)

(After the end of the issue, and award of the venire facias, proceed as follows:)

Which said issue, in form aforesaid joined between the said parties, afterwards, to wit, at the sittings of *nisi prius*, holden at

Westminster Hall, in and for the county of *Middlesex*, on — the — day of —, in the — year of the reign of our lord the now king, before the right honourable *Edward Lord Ellenborough*, chief-justice of our said lord the king, assigned to hold pleas in the court of our said lord the king before the king himself, *Edward Law*, Esquire, being associated unto the said chief-justice, according to the form of the statute in such case made and provided, came on to be tried by a jury of the said county of *Middlesex*, for that purpose duly impanelled: At which day came there as well the said *A. B.* as the said *C. D.* by their respective attornies aforesaid; and the jurors of the jury aforesaid, impanelled to try the said issue, being called, also came, and were then and there in due manner chosen and sworn to try the said issue: And upon the trial of that issue, one *E. F.* was produced and examined upon oath as a witness, by the counsel learned in the law for the said *A. B.* in support of the said action; and upon the cross-examination of the said *E. F.* by the counsel learned in the law for the said *C. D.* the said *E. F.* was asked by the said last-mentioned counsel, whether he had not been imprisoned, upon a conviction for forging a coal-meter's ticket: Whereupon the said chief-justice then and there interposed, and before the said *E. F.* had given any answer to the said question, declared and delivered his opinion, that the said *E. F.* was not bound to answer the said question; and the said *E. F.* thereupon then and there refused to answer the same: And afterwards, at the said trial, the said chief-justice, in summing up the evidence given in the said cause to the jury aforesaid, did further declare and deliver his opinion to the said jury, that the said *E. F.*'s refusal to answer the said question, threw no manner of discredit upon him the said *E. F.*; and the jury aforesaid thereupon then and there gave their verdict for the said *A. B.* and — *l.* damages: Whereupon the said counsel for the said *C. D.* did then and there on behalf of the said *C. D.* except to the aforesaid opinion of the said chief-justice, and insisted that the said *E. F.* was bound to answer the said question, and that his refusal to answer the same was, and ought to be considered by the said jury, as an impeachment of his credit: And inasmuch as the said several matters hereinbefore mentioned do not appear by the record, &c. (*as in the last.*)

APPENDIX.—No. II.

Affidavit to put off trial on account of absence of material witness.
(Tidd's Forms, 310.)

In the King's Bench, &c.

A. B. plaintiff,
 and

C. D. defendant.

C. D. of —, the defendant in this cause, maketh oath and saith, that issue was joined in this cause, in — term last past, and that notice was given for the trial thereof at the — sitting within (or, at the sittings after) the said term: And this deponent further saith, that E. F. late of — is a material witness for him this deponent in the said cause, as he is advised and believes, and that he cannot safely proceed to the trial thereof, without the testimony of him the said E. F. And this deponent further saith, that in consequence of the notice of trial so given as aforesaid, he this deponent caused inquiry to be made, &c. (*stating the nature and result of the inquiry made after the witness, and the time when he is likely to attend.*)

Sworn, &c.

C. D.

APPENDIX.—No. III.

STAT. 1 WILL. IV. c. 22.

An Act to enable Courts of Law to order the examination of Witnesses upon Interrogatories and otherwise.

WHEREAS great difficulties and delays are often experienced, and sometimes a failure of justice takes place, in actions depending in courts of law, by reason of the want of a competent power and authority in the said courts to order and enforce the examination of witnesses, when the same may be required, before the trial of a cause: And whereas by an act passed in the thirteenth year of the reign of his late Majesty King George the Third, intituled, *An Act for the establishing certain Regulations for the better Management of the Affairs of the East India Company, as well in India as in Europe*, certain powers are given and provisions made for the examination of witnesses in India in the cases therein-mentioned; and it is expedient to extend such powers and provisions: Be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that all and every the powers, authorities, provisions, and matters contained in the said recited act, relating to the examination of witnesses in India, shall be and the same are hereby extended to all colonies, islands, plantations, and places under the dominion of his Majesty in foreign parts, and to the judges of the several courts therein, and to all actions depending in any of his Majesty's courts of law at Westminster, in what place or country soever the cause of action may have arisen, and whether the same may have arisen within the jurisdiction of the court to the judges whereof the writ or commission may be directed, or elsewhere, when it shall appear that the examination of witnesses under a writ or commission issued in pursuance of the authority hereby given will be necessary or conducive to the due administration of justice in the matter wherein such writ shall be applied for.

II. And be it further enacted, when any writ or commission shall issue under the authority of the said recited act, or of the power hereinbefore given by this act, the judge or judges to whom the same shall be directed shall have the like power to compel and enforce the attendance and examination of witnesses as the court

whereof they are judges does or may possess for that purpose in suits or causes depending in such court.

III. And be it further enacted that the costs of every writ or commission to be issued under the authority of the said recited act, or of the power hereinbefore given by this act, in any action at law depending in either of the said courts at Westminster, and of the proceedings thereon, shall be in the discretion of the court issuing the same.

IV. And be it further enacted, that it shall be lawful to and for each of the said courts at Westminster, and also the court of common pleas of the county palatine of Lancaster, and the court of pleas of the county palatine of Durham, and the several judges thereof, in every action depending in such court, upon the application of any of the parties to such suit, to order the examination on oath, upon interrogatories or otherwise, before the master or prothonotary of the said court, or other person or persons to be named in such order, of any witnesses within the jurisdiction of the court where the action shall be depending, or to order a commission to issue for the examination of witnesses on oath at any place or places out of such jurisdiction, by interrogatories or otherwise, and by the same or any subsequent order or orders to give all such directions touching the time, place, and manner of such examination, as well within the jurisdiction of the court wherein the action shall be depending as without, and all other matters and circumstances connected with such examinations, as may appear reasonable and just.

V. And be it further enacted, that when any rule or order shall be made for the examination of witnesses within the jurisdiction of the court wherein the action shall be depending, by authority of this act, it shall be lawful for the court, or any judge thereof, in and by the first rule or order to be made in the matter, or any subsequent rule or order, to command the attendance of any person to be named in such rule or order for the purpose of being examined, or the production of any writings or other documents to be mentioned in such rule or order, and to direct the attendance of any such person to be at his own place of abode, or elsewhere, if necessary or convenient so to do; and the wilful disobedience of any such rule or order shall be deemed a contempt of court, and proceedings may be thereupon had by attachment (the judge's order being made a rule of court before or at the time of the application for an attachment), if, in addition to the service of the rule or order, an appointment of the time and place of attendance in obedience thereto, signed by the person or persons appointed to take the examination, or by one or more of such persons, shall be also served together with or after the service of such rule or order: Provided always, that every

person whose attendance shall be so required shall be entitled to the like conduct money and payment for expenses and loss of time as upon attendance at a trial: Provided also, that no person shall be compelled to produce, under any such rule or order, any writing or other document that he would not be compellable to produce at a trial of the cause.

VI. And be it further enacted, that it shall be lawful for any sheriff, gaoler, or other officer having the custody of any prisoner, to take such prisoner for examination under the authority of this act, by virtue of a writ of habeas corpus to be issued for that purpose, which writ shall and may be issued by any court or judge under such circumstances and in such manner as such court or judge may now by law issue the writ commonly called a writ of habeas corpus ad justificandum.

VII. And be it further enacted, that it shall be lawful for all and every person authorized to take the examination of witnesses by any rule, order, writ, or commission made or issued in pursuance of this act, and he and they are hereby authorized and required to take all such examinations upon the oath of the witnesses, or affirmation in cases where affirmation is allowed by law, instead of oath, to be administered by the person so authorized, or by any judge of the court wherein the action shall be depending; and if upon such oath or affirmation any person making the same shall wilfully and corruptly give any false evidence, every person so offending shall be deemed and taken to be guilty of perjury, and shall and may be indicted and prosecuted for such offence in the county wherein such evidence shall be given, or in the county of Middlesex if the evidence be given out of England.

VIII. And be it further enacted, that it shall and may be lawful for the master, prothonotary, or any other persons to be named in any such rule or order as aforesaid for taking any examination in pursuance thereof, and he and they are hereby required to make, if need be, a special report to the court touching such examination, and the conduct or absence of any witness or other person thereon or relating thereto; and the court is hereby authorized to institute such proceedings and make such order and orders upon such report, as justice may require, and as may be instituted and made in any case of contempt of the court.

IX. And be it further enacted, that the costs of every rule or order to be made for the examination of witnesses under any commission or otherwise by virtue of this act, and of the proceedings thereupon, shall (except in the case hereinbefore provided for) be costs in the cause, unless otherwise directed either by the judge making such rule or order, or by the judge before whom the cause may be tried, or by the court.

X. And be it further enacted, that no examination or deposition to be taken by virtue of this act shall be read in evidence at

any trial without the consent of the party against whom the same may be offered, unless it shall appear to the satisfaction of the judge that the examinant or deponent is beyond the jurisdiction of the court, or dead, or unable from permanent sickness or other permanent infirmity to attend the trial; in all or any of which cases the examinations and depositions certified under the hand of the commissioners, master, prothonotary, or other person taking the same, shall and may, without proof of the signature to such certificate, be received and read in evidence, saving all just exceptions.

XI. Provided always, and be it further enacted, that no order shall be made in pursuance of this act by a single judge of the court of pleas of the said county palatine of Durham, who shall not also be a judge of one of the said courts at Westminster.

ADDENDA.

Page 24. *Declarations against interest.*] Entries made by a deceased collector of taxes in a *private book*, charging himself with the receipt of sums of money, are evidence against a surety of the receipt of the money, though the parties who paid the money are alive and might be called. *Middleton v. Malton*, 10 B. and C. 317.

36. *Evidence of collateral facts.*] Where the question was whether a slip of land between some old enclosures and the highway, was vested in the Lord of the Manor or the owner of the adjoining freehold, it was held that evidence might be received of acts of ownership by the Lord of the Manor on similar slips of land not adjoining his own freehold in various parts of the manor. *Doe v. Kemp*, 7 Bingh. 332.

71. *Dispensing with proof of execution of deed.*] It appears that the rule laid down in *Pearce v. Hooper*, does not apply to a case where the party producing the deed has had it so long in his possession (as nine months) that he might have been prepared to prove the execution. *Vacher v. Cocks*, 10 B. and C. 147.

87-88. *Competency of party to the suit.*] So where one of several defendants had suffered judgment by default, it was held that he might, with his own consent, be called as a witness for the plaintiff. *Worrall v. Jones*, 7 Bingh. 395.

98. *Opinion of witnesses.*] So in *Rickards v. Murdock*, 10 B. and C. 527, it was held that the opinion of underwriters might be received, on a question whether certain facts not communicated to the underwriter were material.

132. *Right of beginning.*] In order to entitle the defendant to begin by admitting the plaintiff's case, he must admit the whole of his case. *Doe v. Tucker*, 1 M. and M. 536.

140. *Damages in action by vendee v. vendor.*] If there be no *mala fides* in the vendor, the vendee will not be entitled to recover more than nominal damages for the breach of the contract, where the vendor from a defect in the title is unable to complete the conveyance. *Walker v. Moore*, 10 B. and C. 416. *Hopkins v. Glazebrook* was distinguished on the ground that the vendor was in fault, by representing himself as the owner of the property when in fact he was not so.

152. *Bill accepted by one of several partners, and applied, in part, to his separate account.*] See *Windle v. Crowther*, 1 Crom. and Jerv. 316.

197. *Attorney's bill.*] Business done under a commission of bankruptcy is not business in respect of which an attorney is compella-

ble to deliver a bill a month before the action, *Hamilton v. Pitt*, 7 *Bingh.* 232. Charges by an attorney for attending and advising a party in a suit are taxable charges. *Smith v. Taylor*, 7 *Bingh.* 259. In the latter case it was held that an item of 3*l.* for money lent (for the purpose of discharging the costs of the action in respect of which the other items accrued) could not be recovered, no bill having been duly delivered.

235. *Account stated.*] A mere offer of a sum of money to escape from an action and to purchase peace is not evidence of an account stated. *Wayman v. Hilliard*, 7 *Bingh.* 101.

238. *Plea in abatement—non-joinder of dormant partner.*] “If a person contract with two others, he may sue them only; if after the contract be made, he discover that they had a secret partner who had an interest in the contract, he is at liberty to sue the secret partner jointly with them, but he is not bound to do so.” *Per Parke, J. De Mautort v. Saunders*, 1 *Barn. and Adolph.* 401.

255. *Statute of limitations, written promise.*] If a promise in writing, taking the case out of the statute of limitations, be lost, parol evidence of its contents may be received. *Haydon v. Williams*, 7 *Bingh.* 163. *Per Tindal C. J. ibid.* “That statute (9 Geo. IV. c. 14) did not intend as it appears to us to make any alteration in the legal construction to be put upon acknowledgments or promises made by defendants, but merely to require a different mode of proof; substituting the certain evidence of a writing signed by the party chargeable, instead of the insecure and precarious testimony to be derived from the memory of witnesses.”

258. *Payment taking a case out of the statute of limitations.*] *Atkins v. Tredgold.* So after the death of one maker of a joint and several promissory note signed by two, a payment upon it by the executor of the deceased party, will not take the debt out of the statute as against the survivor. *Slater v. Lawson*, 1 *Barn. and Adolph.* 396.

298. *Case for defamation, evidence under the general issue.*] Where the plaintiff declares for a libel on him in the way of his trade, the defendant may show under the general issue, that the plaintiff does not in fact carry on such trade, though the disproving of the allegation does in effect and substance disprove the truth of the imputation in the libel. *Manning v. Clement*, 7 *Bingh.* 362.

311. *Evidence under non est factum.*] Where a party who executes a bond is at the time competent to execute it, he cannot, under *non est factum*, show that he was misled as to the legal effect of the bond. *Edwards v. Brown*, 1 *Crom. and Jerv.* 307.

317. *Debt on bail bond—evidence under non est factum.*] On the plea of *non est factum*, the bail might have been admitted to prove

circumstances rendering the bond illegal, as that it was executed after the return; or if a proper case has been made out, showing that the party bailed never was in the county or heard of the writ, and that the bail were imposed on, then they might have been entitled to relief on *non est factum* pleaded. But the *onus* of proving such fraud or circumstances of illegality lies upon them. *Per Littledale, J. Taylor v. Clow*, 10 B. and C. 226.

324. *Ejectment—twenty years' possession a sufficient title.*] Thus where the plaintiff proved twenty years possession, and the defendant proved that he had been in possession subsequently for ten years, it was held that the plaintiff was entitled to recover. *Doe v. Cooke*, 7 Bingh. 346.

332. *Ejectment—demand in case of lawful possession.*] If the agent of a mortgagee applies to a person in the possession of the land, for rent, he cannot afterwards eject him without a demand of possession. *Doe v. Halls*, 7 Bingh. 322.

334. *Notice to quit by jointenant.*] A notice to quit given by one of several jointenants on behalf of the others, will determine the tenancy as to all. *Doe v. Summersett*, 10 B. and C. 135.

363. *Marriage void by publication of banns in wrong name.*] The rules on this subject are fully laid down by Lord Tenterden in *R. v. Inhab. of Tibshelf*, 1 B. and Ad. 195. "These rules are fully established, first, if there be a total variation of name or names, that is, if the banns are published in a name or names totally different from those which the parties, or one of them ever used, or by which they were ever known, the marriage in pursuance of that publication is invalid, and it is immaterial in such cases, whether the misdescription has arisen from accident or design, or whether such design be fraudulent or not.

But, secondly, if there be a partial variation of name only, as the alteration of a letter or letters, or the addition or suppression of one christian name, or the names have been such as the parties have used, and been known by at one time and not at another, in such cases, the publication may or may not be void; the supposed misdescription may be explained, and it becomes a most important part of the inquiry, whether it was consistent with honesty of purpose, or arose from a fraudulent intention. It is in this class of cases only, that it is material to inquire into the motives of parties.

374. *False imprisonment.*] By stat. 7 and 8 Geo. IV. c. 29, s. 63, any person found committing any offence punishable, either upon indictment or upon summary conviction, by virtue of that act, except only the offence of angling in the day-time, may be immediately apprehended without a warrant by any peace officer, or by the owner of the property on or with respect to which the offence shall

be committed, or by his servant, or any person authorized by him, and forthwith taken before some neighbouring justice of the peace, to be dealt with according to law.

There is a similar provision in the malicious injuries act, 7 and 8 Geo. IV. c. 30, s. 28. To justify the apprehension of an offender under this act, he must be taken in the fact or on a quick pursuit. *Hanway v. Boulbee*, 4 C. and P. 350.*

395. *Trover, proof of property in the plaintiff.*] Where the defendant, a wharfinger, acknowledged certain timber on his wharf to be the property of the plaintiff, it was held that he could not afterwards dispute the plaintiff's title in an action of trover. *Gosling v. Birnie*, 7 Bingh. 339.

405. *Evidence of conversion by demand and refusal.*] The captain of a ship who had taken goods on freight and claimed to have a lien on them, delivered them to a bailee. The real owner demanded them of the latter, and he refused to deliver them without the directions of the bailer. Held that the bailer not having lien upon the goods, the refusal by the bailee was sufficient evidence of a conversion. *Wilson v. Anderton*, 1 Barn. and Adolph. 450.

414. *Notice of disputing bankruptcy.*] Where notice of disputing the trading, &c. has been given, and part of the amount claimed could not have been recovered by the bankrupt, the proceedings are not proof of the trading, &c. except as to the amount for which the bankrupt himself might have sued. *Gibson v. Oldfield*, 4 C. and P. 313.*

450. *Competency of bankrupt.*] A bankrupt cannot be called to explain an act which may defeat his commission. *Sayer v. Garnett*, 7 Bingh. 103.

* 19 Eng. Com. Law Reps. 415. * 19 Id. 403.

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- even where party a marksman. *Id.*
- evidence of party's hand-writing not necessary. *Id.*
- if witness sick, his hand-writing cannot be proved. *Id.*
- if incompetent at time of attestation, nullity, and hand-writing of party must be proved. *Id.*
- unless party knew him to be incompetent. *Id.*
- where name of witness fictitious, or if he denies the execution, or has attested without request, the hand-writing of the party may be proved. *Id.*
- where two witnesses, and one is incompetent, the other must be called. *Id.*
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THE END.

ERRATA.

Page 234, line 9, for *Blaney v. Henricks*, 2 *Wilson*, 205, read
Blaney v. Hendricks, 2 *W. Black*. 761.

— 156, ——— 4, in note, for *recital*, read *receipt*.

— 259, ——— 3, ———, for *state demands*, read *state demands*.





